Neutral Citation Number: [2026] EWHC 2184 (Ch)

Case No: BL-2023-000492

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
LONDON
EC4A 1NL

18 August 2026

Before :

MR JUSTICE FANCOURT

- -

BETWEEN:

GARDEN HOUSE SOFTWARE LIMITED

Claimant

- and –

(1) TIMOTHY JOHN MARSH
(2) TIMOTHY NICHOLAS ROWLAND
(3) ANDREW PORTER
(4) MARK HARRISON
(5) LUCY SUN
(6) PAMELA BALL
(7) SERISYS ASSET HOLDING LIMITED

Defendants

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Mr Jamie Riley KC and Mr Calum Mulderrig (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Mr Michael Smith (instructed by **Cadence Solicitors LLP**) for the **First, Second, Sixth and Seventh Defendants**
Mr Simon Mills and Mr Samuel Lane (instructed by **JPP Law LLP)** for the **Third, Fourth and Fifth Defendants**

Hearing dates: 27 April (pre-reading), 28, 29 April, 5-8, 11-15, 20- 22 May, 11 June 2026

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APPROVED JUDGMENT

(circulated in draft on 30 July 2026)

Contents

Fancourt J:

I. Introduction

1. The Claimant ("GHSL") is the assignee of the claims of Serisys Limited (in liquidation), a company incorporated in England and Wales ("the Company"). The Company was insolvent and was compulsorily wound up on the petition of the Commissioners of Her Majesty's Revenue and Customs ("HMRC") on 27 March 2019.

2. The Company was acquired and renamed by Serisys Solutions Limited (a company incorporated in Hong Kong ("SSL")) in about 2013. It then became one of a number of wholly-owned subsidiaries of Serisys Group Limited ("SGL") from late 2014, alongside SSL and a Thai company called Serisys Solutions (Thailand) Co. Ltd ("SSTL"). SGL itself was only a holding company, responsible for financing the businesses of its subsidiaries, and did not trade.

3. I will refer to the Serisys group of companies, as a group, as "Serisys", which was the name that tended to be used by SGL's directors, and by directors or employees of the subsidiaries, when referring to the business of the group. It is, however, important to distinguish between SGL and the individual operating companies and their businesses.

4. The principal business of Serisys at the relevant time, conducted by the Company in Watford and SSL in Hong Kong, was to design, develop and market, with a view to licensing in due course, cloud-based financial services software called "Adypt". This, when fully developed, would enable large international banks, trading exchanges or brokers to develop applications to deal with their international accounting and settlement requirements internationally, in real time. Serisys also derived income from another mature product called "Decide", which is relevant only for the limited cash flow benefits that it provided to Serisys.

5. The Adypt software was conceived and initially developed by six highly skilled employees of the Company, in particular Dr Graham Timothy Rhodes, who gave evidence to explain its origins and early development from February 2013. These few employees were involved in the architectural design of the software and in writing the code.

6. Dr Rhodes established a company for that purpose that was later renamed Serisys Limited. He and his colleagues at the Company had had experience at another company, Coexis Ltd, of creating an earlier version of a similar software programme, called "SYN~". The shareholders of Coexis Ltd sold their shares to an Australian company in 2008 for about £22 million.

7. When the Company was sold to SSL in July 2013, Dr Rhodes became a director of SSL, and then SGL when Serisys was restructured.

8. This case is concerned with the later assignment by deed by the Company of all its intellectual property ("IP"), including the developing Adypt software, to a newly incorporated Hong Kong company on 30 August 2017 ("the Assignment"). The new company was Serisys Asset Holding Limited ("SAHL"), the Seventh Defendant, also a wholly-owned subsidiary of SGL.

9. GHSL alleges that the Assignment was a transaction at an undervalue ("TUV"), a transaction defrauding creditors ("TDC") and a breach of the Company's directors' duties, on the ground that very valuable IP was assigned for consideration of no value to the Company, namely a one-year non-exclusive, non-assignable licence to use the Adypt software. Other claims are made against the various Defendants.

10. The prime movers of Serisys are the First and Second Defendants, Mr Timothy Marsh and Mr Nicholas Rowland, directors of SGL, both of whom gave evidence and were examined at some length. Mr Thibault Langlet was in control of the Bangkok office of Serisys and was and remains an executive director of SSTL and SGL. A Mr HK Mo, based in Hong Kong, was an executive director of SSL and SGL until August 2017. Neither of them gave evidence.

11. At various relevant times, SGL had other directors. Dr Rhodes remained an executive director until he resigned in July 2015. Mr Bartholomew ("Barty") Smith was a non-executive director until January 2016, and Mr Richard Hubbard was a non-executive director until November 2017 (except for the month of October 2017).

12. The Third Defendant, Mr Andrew Porter, became a non-executive director of SGL in January 2015 and resigned in March 2019, the day before the Company was wound up. The Fourth Defendant, Mr Mark Harrison, became a non-executive director of SGL in February 2017 and resigned in October 2018. The Fifth Defendant, Ms Lucy Sun, became a non-executive director of SGL in March 2017 and resigned in November 2018. All three acquired relatively small shareholdings in SGL. All three were directors of SGL at the time of the Assignment. It is GHSL's case that they were also de facto or shadow directors of the Company. Each of them gave evidence at some length.

13. The Sixth Defendant, Ms Pamela Ball, is the wife of Mr Marsh, and was a funder of SGL. Her interest in this case is as the chargee of SAHL's IP. She maintains that her charge is valid and has priority over, or otherwise prevents, the claim of GHSL to set aside the Assignment and revest the Company's former IP in GHSL. Ms Ball also gave evidence.

14. It will be necessary later to identify with greater particularity the multiplicity of claims that GHSL brings against the various Defendants and the many issues that in consequence arise for decision.

15. For the purposes of this claim, the Defendants fall into two groups: the First, Second, Sixth and Seventh Defendants, being essentially Serisys and those associated with it, who were referred to throughout the case as "the THDs" (as they were initially represented by Trowers and Hamlins LLP); and the Third, Fourth and Fifth Defendants, who have been represented throughout by JPP Law Limited ("the JPPDs").

16. It is pertinent to note at this stage that GHSL is owned by companies controlled by Mr Barty Smith and a Mr Kenny Shovell, who were and are both (indirectly) shareholders of and investors in SGL. Their interests and those of Andrew Scott, another investor, were represented on the board of SGL by Mr Hubbard, until he resigned (twice). The THDs maintain that the claim by GHSL is essentially a shareholder dispute in a different guise, with those behind GHSL who purchased the liquidator's claims aiming to obtain control of Adypt, or part of Adypt.

17. At one stage, when Adypt was put up for sale, Mr Shovell's company, Key IP Limited, offered to take it over giving Mr Marsh, Ms Ball and Mr and Mrs Rowland a 20-30% stake in a new company owning it. The offer was not accepted. Mr Shovell later offered to accept US$342,600 for Key IP Ltd's shares but no agreement was reached. It appears that both sides (that is, GHSL and the THDs) consider that Adypt, though development has not progressed much (if at all) since 2019, still has considerable potential value. If it no longer had any value, the THDs would have conceded the unwinding of the Assignment a long time ago.

18. The potential value of Adypt may be highly relevant to the exercise of discretion as to the appropriate remedy, if a TUV is established. But questions of motive and reasons for the current dispute do not affect the analysis of whether there was a TUV by virtue of the Assignment.

19. As far as the Assignment is concerned, GHSL's case is that the IP of the Company was assigned to a clean company because the directors of SGL were aware that Serisys was in serious financial difficulty, and that the operating companies, in particular the Company and SSL, were insolvent. SGL could no longer fund their continuing research and development work, no customer for Adypt had been secured, and no income or further investment had materialised. The purpose of the Assignment, it is alleged, was therefore to secure the valuable assets of Serisys and put them beyond the reach of creditors of the Company.

20. The THDs' case is that the Assignment was effected because it was good corporate strategy, and indeed "essential", to have all the IP for Adypt (i.e. that owned by the Company, SSL and SSTL) in one place, to facilitate the grant of licences to use Adypt, or to sell the IP outright, and that the first licence, expected to be agreed with Bank of China International ("BOCI"), was imminent. They say that this was a strategy that had been identified in January 2016, when SGL took some preliminary advice from Bird & Bird in Hong Kong about IP structuring. An intended transfer in Q2 2016 had been delayed because there was unlikely to be any licence granted for some time. By August 2017 it had become "urgent", as Mr Rowland described it.

21. On the same day that the Company assigned its IP to SAHL, SSL did the same. SSTL assigned all its IP (whatever it amounted to – it was not suggested by the Defendants that SSTL had any rights relating to Adypt) to SAHL on 14 September 2017.

22. Despite the endeavours to assign the valuable IP to SAHL and the many millions of pounds spent on the development of Adypt by 2017, the THDs' case at trial was that the IP that the Company owned was in fact valueless, and therefore that the consideration that the Company received in the form of a one-year user licence was not significantly less than the value of the consideration that it gave SAHL.

23. The rather startling proposition that the Company's IP had nil value, at the stage when it was imminently about to be licensed, was advanced on the basis that the Company had only an undivided share of Adypt, as significant parts of the code were written by employees of SSL in Hong Kong, and only the entire software package had value. The Defendants contended that the part of Adypt written by the Company's employees over 4 years, and for which in principle the Company held the copyright or a share of the copyright, could either not be accurately identified, or if it could be, it had no separate value because it could not be separately licensed or otherwise realised. Only by putting

the code written by the Company and the code written by SSL together, which neither company could do without the agreement of the other, was Adypt potentially worth – in Mr Marsh's contemporaneous estimation – about US$100 million. In his evidence at trial, he said about US$250 million.

24. SAHL was, on any view, a connected person of the Company, and so the "relevant time" for the purpose of s.238 of the Insolvency Act 1986 ("the 1986 Act") is a period of two years before the onset of insolvency (which was the presentation of the winding up petition, on 8 February 2019). The period therefore began on 8 February 2017.

25. The important questions, when considering whether there was a TUV, are the value of the Company's assigned IP, and whether the Company was unable to pay its debts within the meaning of s.123 of the 1986 Act on 30 August 2017, either before or as a result of the Assignment (s.240(2) of the 1986 Act). The THDs dispute that the Company was insolvent and seek to rely on the statutory defence in s.238(5) of the 1986 Act, on the basis that the Assignment was made in good faith, for the purpose of carrying on the Company's business, and that there were reasonable grounds for believing that it would benefit the Company.

26. The important additional question when considering whether there was a TDC is whether the Assignment was made for the purpose of putting assets beyond the reach of a person who may make a claim against the Company, or of otherwise prejudicing the interests of such a person in relation to such a claim (s.423(3) of the 1986 Act).

27. So far as the JPPDs are concerned, the case against them (as it stood at the end of the trial) is advanced in essentially two different ways. First, on the basis that they were de facto directors of the Company itself, as well as directors of SGL, and that they acted in breach of their duties to the Company and its creditors. Second, on the basis that in any event they either combined with the *de jure* directors of the Company and SAHL with the intention of injuring the Company and its creditors by unlawful means, or alternatively acted dishonestly in assisting the *de jure* directors of the Company to breach their duties, by approving the Assignment or by standing by and allowing it to proceed without objection when they knew that it was objectionable.

II. The Main Issues in the Case

28. The parties produced an agreed long list of issues for trial, many of which I will need to address in due course. I do not propose to set out that list here, to avoid lengthening this judgment unnecessarily. The key issues that I first have to decide are:

    i) what the nature of the Company's rights in the Adypt software were at the time of the Assignment;

    ii) the value of those rights at that time;

    iii) whether the consideration received by the Company under the Assignment was substantially less than that value;

    iv) whether the Company was unable to pay its debts at the time of the Assignment;

v) whether the Assignment was made with the intention of putting assets beyond the reach of creditors, or whether it was made in good faith and reasonably, to advance the Company's business;

vi) who were the directors of the Company at the time of the assignment;

vii) whether any of those directors acted in breach of their statutory duties; and

viii) if the JPPDs were not directors of the Company, whether they are liable for conspiracy to injure or as dishonest assistants in breaches of trust.

29. There are also separate issues relating to:

i) whether the directors of the Company knew or ought to have concluded in August 2017 that there was no reasonable prospect of avoiding insolvent liquidation;

ii) if so, whether the directors took every step to minimise losses to creditors;

iii) the quantum of any liability for wrongful trading;

iv) whether any director found to be in breach of duty should be relieved from liability on the basis that they acted honestly and reasonably and in the circumstances ought fairly to be excused;

v) the validity and effect of charges granted by SAHL to Ms Ball in 2019 and 2026;

vi) whether the 2026 charge should be set aside as a TUV and TDC;

vii) whether payments made by the Company to Mr Marsh totalling £105,790 in September and October 2018 (at which time it is not disputed that the Company was insolvent) were preferences or unlawful loans, or alternatively were transfers of money that the Company owed SGL.

30. There are then issues about what relief it is appropriate to grant, to the extent that GHSL proves its case.

31. Before addressing these issues in turn, I will say something about the witnesses from whom I heard live evidence and their involvement in the story, and about those who did not give evidence.

III. The Witnesses of Fact

32. On behalf of GHSL, only one witness of fact was called, Dr Rhodes.

33. I found Dr Rhodes to be a straightforward witness, very sharp and alert, despite the advancing years to which he alluded, and with strong recall of events. He was frank in acknowledging a deception (wholly irrelevant to the issues in this claim) in relation to the sale of SYN~, and I am satisfied that he was telling the truth, as he best recalled it, about the progress of the development of Adypt, and the fact that he has no direct financial interest in the outcome of this claim. Whether his assertion in late 2015 that he

was entitled to compensation from SSL for his work, or had some entitlement to Adypt, had merit is ultimately irrelevant, but I am satisfied that it was advanced as a negotiating tactic, to try to secure a deserved payout for his work, and the claim was not seriously pursued by Dr Rhodes after about the Spring of 2016.

34. Mr Kenny Shovell and Mr Barty Smith were not called to give evidence by GHSL. This was pointed out at various times by Mr Michael Smith (Counsel), on behalf of the THDs, who characterised this claim as a fight between shareholders of SGL for control of Adypt. Mr Barty Smith and Mr Shovell control GHSL.

35. Comment about the absence of those witnesses was made by Mr Michael Smith, particularly in relation to the question of whether the Assignment was concealed by the THDs or was known about, was not objected to, and was therefore made for proper purposes. Mr Smith suggested that Mr Barty Smith and Mr Shovell did not wish to give evidence because they would have found it impossible to deny that they knew about the Assignment, or at least about an intention to assign the IP, and would have been forced to admit that they did not raise any objection to it until after the liquidation of the Company. Mr Smith invited me to draw that adverse inference, which in turn would be relevant to the question of whether the Assignment was made in good faith for a proper purpose.

36. It was also pointed out by Mr Smith that no witness was called by GHSL to explain exactly what software was created by employees of the Company, or exactly what was done by Mr Darren Hurt, one of the developers of Adypt, to compile the standalone version of the Adypt platform and modelling repository that was provided to Dr Marshall, GHSL's IT expert, in January 2026. Mr Smith suggested that I should infer that Mr Hurt was not called because of his knowledge of the extent of joint development of Adypt that was carried on by the Company's employees and SSL's employees in collaboration.

37. Turning to the *de jure* directors of the Company and of SGL, Mr Marsh and Mr Rowland were both unimpressive witnesses.

38. Mr Marsh had a good deal to say and was argumentative throughout. He evidently comes from a world where personal contacts make all the difference and result in deals being done. It is a world in which good corporate governance has little role to play. He was clearly very knowledgeable about financial markets and the use of IT in that sector, but he seemed to believe that top tier international banks would rapidly buy his product on the back of his personal contacts with middle-ranking officials in banks and clearing houses. Mr Harrison correctly identified his tendency to treat every assurance from a contact as an indication that a valuable deal was imminent.

39. Mr Marsh had no interest in financial rigour – that was, to be fair to him, intended to be Mr Rowland's role in Serisys; Mr Marsh provided the vision and was the salesman. Mr Marsh cared only that sufficient money to keep Serisys going could be extracted from somewhere (it was regularly provided by him or Ms Ball), no doubt because he genuinely believed (I accept that he did) that the product he was attempting to sell had huge potential value and that the crucial first licence was only a matter of time. As a result, SGL limped from month to month, scraping financial resources together from anywhere it could. It was not clear that Mr Marsh paid much attention to Mr Rowland's cash flow forecasts, but he referred to them at one point as showing a "best case scenario", thereby acknowledging their overly optimistic forecasts.

40. The non-executive directors (NEDs) had a role to play in raising money. Mr Marsh did not recognise the traditional role of a NED on the board of a trading company, nor by and large did they perform it, save to a limited extent for Ms Sun, who from late August 2017 did start to question, outside board meetings rather than in them, what the directors were being told. Each of Mr Porter, Mr Harrison and Ms Sun were appointed because they were considered to have good contacts in the financial markets world and so would assist in the promotion of Adypt by giving Mr Marsh new contacts to pursue. They understood that, and knew that they were not expected to challenge the executive directors. Once recruited, they were seen by Mr Marsh as a valuable additional source of money for SGL, and each was approached by Mr Marsh to help fund SGL, by buying shares, making loans, or both. None of the JPPDs performed competently – or in some cases even conscientiously – the traditional role of a NED of SGL, but they are not on trial for that, as SGL is a Hong Kong company and these proceedings concern the Company's affairs.

41. There was a deficit in good corporate governance throughout, in large part because Mr Marsh seemed to believe in keeping important information, or the full context of the information, to himself, rather than sharing it warts and all with his board. He told me that it was quite possible that he would not have mentioned a potential $3 million investor at the June 2017 SGL board meeting, and that in relation to a possible licence agreement with BOCI he decided to keep his cards close to his chest until there was a contract. Mr Marsh also has the ability to see what he wants to see in correspondence and documents, and sometimes turned a blind eye to what was obvious, in terms of potential customers saying that they had no current interest, and to the implications of that.

42. I found some of the statements Mr Marsh made and explanations he gave very hard to believe. Some were clearly untrue. I consider that the explanation given by Mr Marsh of the creation of the 2019 charge in favour of his wife, the day before the Company was wound up, was simply untruthful, and, similarly, his explanation of the reason for the 2026 charge. In general, I do not feel that I can place reliance on his evidence on any contested factual issues where it is unsupported by documentary evidence or otherwise corroborated. I consider that what he can recall (and he appeared to have good recall, rarely saying that he could not remember something) has undoubtedly been influenced by the exigencies of the case that he is seeking to defend.

43. Mr Rowland was a different personality from Mr Marsh and had a more equable and reasonable presentation, though when things started to get difficult for him he often found that his memory could not help him. Although Mr Rowland said that he used to challenge Mr Marsh about matters that Mr Marsh reported, I am doubtful that this happened to any significant extent. Generally, Mr Rowland would not be in a position to challenge Mr Marsh, as he had not had the meetings or conversations that Mr Marsh had had with his contacts in the market – which were not properly disclosed by Mr Marsh to the board of SGL for scrutiny. Mr Marsh was in any event the stronger personality and took the lead.

44. Mr Rowland took care of the monthly management accounts and cash flow forecasts that were produced for board meetings of SGL. However, these were not cash flows of the type that are often seen, put together by a financial director with precision and an appropriate degree of scepticism about projected income and future events. They were essays in wishful thinking, where expected revenue or investments that had not materialised as previously projected were simply 'rolled over', apparently on the basis

that they would come in due course. The timelines for the arrival of very substantial income or investment, on which a positive cash flow 2 or 3 months later depended, were at times hopelessly unrealistic. Eventually, the position was accepted by Mr Rowland and Mr Porter that they were "optimistic" presentations of how the cash flow might look if the income or investment did materialise. Ms Sun also understood them in that light. Mr Rowland referred to the much needed $3 million investment regularly shown on the cash flow forecasts as arriving about 2-3 months later as a "target", and the cash flows as demonstrating to the board "a viable route to success" and as being a "communication document".

45. I consider that Mr Rowland's explanation that he and others understood at the time of the Assignment that the Company's IP had nil value to be untrue: it is simply wishful thinking, based on a legal construct designed to assist the THDs' case. I also consider that his account of the dates on which the 2017 loan variation agreement and the 2019 charge were signed to be untrue. These documents were created in late March 2019 to attempt to save Adypt from the liquidator of the Company, and were deliberately and knowingly backdated to give an air of credibility to the rights that it was intended that Ms Ball would assert, when necessary, as having priority over the Company in liquidation. I reject his explanation of the reason for the 2026 charge.

46. Given these conclusions and Mr Rowland's admitted poor memory, I do not feel able to accept uncorroborated evidence of Mr Rowland on the factual issues in dispute in this case.

47. Ms Ball was the first of the Defendants' witnesses to give evidence. She is a shareholder of and substantial lender to SGL. She claimed a background in IT and business. Her evidence was a curious mixture of admissions on some issues, such as the lack of any intention on her part to call in her loan to SGL and the 2026 charge being intended to make her position "watertight", and rather incredible explanations on other matters, such as the date and reason for the creation of the 2019 charge and the making of the 2017 loan variation agreement.

48. Ms Ball gave evidence in a way that suggested to me that she was trying to distance herself from the events in question, namely those in 2019 and 2026 relating to the grant of her charge over the IP. She frequently expressed or feigned surprise at what documents appeared to show, as if she was unfamiliar with such matters or was seeing documents for the first time. I thought that she affected to be a little out of her depth on financial matters and unable to explain them, whereas she knew perfectly well, as the wife of Mr Marsh and a substantial lender and investor, what was happening. I have no doubt, contrary to her denial, that the 2019 charge was granted to try to save Adypt for the main owners of SGL.

49. Before leaving the THDs, it is appropriate to note that there were serious deficiencies in their approach to disclosure. Having failed to provide adequate disclosure initially, orders were made in February 2026 with which the THDs then failed to comply. Eventually, the THDs produced 19,545 documents on 6 March 2026 and another 102,822 documents on 13 March 2026. I made an order at the pre-trial review on 31 March 2026 requiring further steps to be taken to search within these large repositories of documents and for new lists and disclosure certificates to be provided and to provide a narrative response to questions about missing documents. This was not complied with satisfactorily. Then, on 8 April 2026, only 3 weeks before the start of the trial, the THDs sent a further 222,647

documents to GHSL and the JPPDs, without any review or de-duplication exercise, any list of those documents or an explanation of the contents of the batch.

50. GHSL alleges that this was deliberately unhelpful and obfuscatory, designed to cause GHSL as much difficulty as possible in progressing the trial. GHSL asked me to draw inferences adverse to the THDs from their failure to give proper disclosure, and pointed out that despite the huge quantity of documents disclosed, there were still obviously large gaps, such as the WhatsApps between them and with others. In the event, by the time of closing submissions, GHSL did not seek to rely on specific adverse inferences but on the evidence that by that stage had emerged. However, I am satisfied that there are likely to be other potentially important documents, including emails, WhatsApps and other messages passing between the directors and shareholders of SGL which have not been disclosed.

51. I turn to the JPPDs, and it is necessary to give a little detail about their involvement with Serisys, their experience prior to becoming non-executive directors, and the account that they gave about their involvement in their role from 2017 to 2018 in particular.

52. Mr Porter presented as a careful witness but an ineffectual non-executive director. He said that no one ever challenged what the executive directors of SGL did. This was revealing and, on the basis of the evidence that I heard, appears largely true. He emphasised that he had relatively little time for Serisys on account of his other work commitments and that his limited commitment was agreed with Mr Marsh.

53. Mr Porter is a technology implementation specialist, who had spent 20 years working for banks in that field. He had not previously sat on a board of a company as a non-executive director, but he was the Chief Technology Officer and a board member of Bright Pearl Ltd from March 2015 to January 2022.

54. He explained that in his experience it was standard for IT companies to make losses until customers are signed up. His role was to advise on commercialisation of Adypt. He described how he spent time with Mr Briscoe of London Clearing House ("LCH"), but when that opportunity fell away, Mr Briscoe made introductions to Mr Greg Allen of London Stock Exchange Group ("LSEG"). Mr Porter met Mr Allen in May 2017 and considered that LSEG was a good prospect, then Mr Marsh took over that relationship. Mr Porter also knew Mr Gary Ma, the Chief Information Officer at BOCI and had one meeting with him about Adypt.

55. Mr Porter recalled the dispute in June 2015 between Dr Rhodes and Mr Shovell and the board of SGL about Dr Rhodes's claim for remuneration, and said that he tried to mediate the dispute. But he claimed to have no recollection of the discussion about a two-year plan to optimise the location of Serisys's IP, as raised in the January 2016 board meeting, though he accepted that he agreed the proposal at the meeting. He recalled being comforted that legal advice had been taken on the proposal.

56. He said that he attended board meetings to report on the progress of development and contact with potential customers, such as Barclays Capital and LCH, and did not look "in any detail" at the cash flow forecasts, and "did not have visibility on finances". He did the work that he did pursuant to his company's consultancy agreement and denied that he was a director of the Company. He said that he simply relied on Mr Marsh and Mr Rowland for investment in SGL and had no reason to disbelieve them, and that money

would come in to Serisys from one source or another, though he accepted that things were getting increasingly urgent by the end of 2016 and that Serisys was under financial stress at the end of October 2017. He knew that Adypt needed what he called an “anchor customer” to get it going, but recognised that no one wanted to be the first person to use Adypt.

57. Mr Porter lost some credibility by insisting that an email from LSEG received on 22 August 2017, saying that they had no current interest in using Adypt, was good news. It clearly was not, particularly when Mr Briscoe, who was Mr Marsh’s contact at LSEG, left his job shortly afterwards. Mr Porter said that his contemporaneous comment to Mr Marsh indicated that it was a good time to update the board on LSEG’s interest, but then neither he nor Mr Marsh did so during the meeting. I consider that it was not raised because bad news was not welcome to Mr Marsh. Mr Porter was also less than frank about the circumstances in which he resigned as a director and sold his shares to Mr Rowland on the very day that the Company was wound up. He was clearly trying to distance himself from any potential fallout, in view of his possible new job with Citibank.

58. Nevertheless, and bearing in mind that lack of frankness about certain matters does not mean that a witness is lying about everything, I consider that he was probably being truthful in saying that he did not pay attention to the detail of the finances of SGL and the projections, though he knew that Serisys was struggling to raise the money it needed. Finance was not recognised as being his role, and he relied on Mr Rowland. I also accept his evidence that there was no questioning in August 2017 of the proposed assignment of the IP because of the way it was presented by Mr Rowland as largely administrative, good practice, and as advised by Bird & Bird, and in any event not for decision by the board of SGL at that meeting. It was not suggested that Mr Porter had been previously involved in a strategy to strip the Company of its assets, merely that he failed to ask appropriate questions at the meeting.

59. It is very surprising that Mr Porter did not call for a meeting of the board once the financial crisis at the end of October 2017 and in early November 2017 became apparent, or when in 2018 substantial funders of Serisys started to request repayment of their loans. But that in my view merely demonstrates that he was inadequate as a non-executive director, or distracted by the recent sudden death of his father in October 2017, or both.

60. Mr Harrison came across as urbane and experienced in the world of technology in financial services, being now a management consultant in that field. He described his expertise as leveraging technology to achieve business change. His particular skillset is advising on and managing clients’ needs as they go through implementation of technology change. He had had experience as the chair of a smaller technology start-up company in the 1990s, where he said that he dealt with accounts and cash flow forecasting.

61. Mr Harrison invested in SGL first, in September 2016, before becoming a non-executive director in March 2017. He explained that he had to get clearance from his employer at that time, and only had a little time to spend on Serisys. He said that he was engaged to help to look for funding, by introductions to clients, not to assist with the financial planning of SGL. He said that in the early meetings as a director (April 2017 was his first), he relied on others, did not read the cash flows carefully, but was aware of the urgent need for funding. He recognised that others on the board, such as Mr Hubbard, who was an accountant, were better placed to scrutinise the figures.

62. He agreed that finding the first customer was key and considered that that was all that was needed for Adypt to take off. But he wanted Mr Marsh to focus on Tier 2 and Tier 3 institutions to begin with, whereas Mr Marsh was more inclined to aim at Tier 1 from the outset, consistently with Mr Harrison's view that Mr Marsh was over-confident "across the board". He accepted that, with hindsight, the cash flow forecasts were wholly unrealistic, but he did not assess that in the April and June 2017 board meetings, and did not challenge Mr Rowland's assertions, as he was newly on board. In July 2017, he was reviewing the forecasts and said that they seemed a bit optimistic and that Serisys faced a financial challenge. By the time of the August 2017 board meeting, he recognised that some substantial investment was needed, but did not challenge the forecasts at that meeting. He was on holiday at the time and would not have gone through the documents pack in detail, he said. By November 2017, however, when he met Mr Hubbard over breakfast, Mr Harrison knew very well that Mr Marsh's and Mr Rowland's views were unreliable, and considered that Mr Marsh was an unsuitable CEO. He asserted that he grew into the role of non-executive director and by November 2017 was willing to challenge, in light of the shock about inability to pay the Watford rent and wages. However, he considered that short term funding could cover payment of creditors.

63. Mr Harrison said that he raised no questions at the August 2017 board meeting about the proposed assignment of the Company's IP to SAHL as he had no knowledge of that area and the briefing about what was being done, with the benefit of legal advice, was credible. Mr Harrison said that he took what he was told about legal advice on trust. He did not agree to the Assignment because the board was not asked to agree. Similarly, he said that raising challenges to financial forecasts in the context of inability to pay debts was a practice that he was not used to: he was not an experienced businessman. I found that rather unconvincing, the truth being that Mr Harrison did not see that as his role at Serisys.

64. Mr Harrison was at times rather obdurate as a witness, and would not readily agree with a question, preferring carefully to formulate his answer, which was sometimes an answer to a different question. On other occasions he would quibble with the wording of questions about his knowledge of cash flow problems. He too said that he would have held the view in August 2017 that the Company's IP was of no value, but I do not accept that. If he considered the question at all, he would have known that it was the Company's only valuable asset, apart from the loyalty of its employees. He was unable to explain why he did not call a board meeting in November 2017, when the scale of Serisys' financial crisis was clear. He claimed that the "smells bad" comment made about the transfer of the IP to SAHL was in the context of a concern he had about how investors would see it, if they were asked to support a restructuring of Serisys, not about moving assets from an insolvent company. I do not accept that either. Investors would have seen it in the same way as a competent company director would have seen it, namely as something that raised questions of propriety.

65. I do have concerns about whether Mr Harrison was telling the Court the unvarnished truth about events with which he was concerned. It is probable that he had a better understanding of the state of Serisys's finances, including its cash flow difficulties, than the other non-executive directors, but for whatever reason did not raise his concerns until November 2017.

66. Ms Sun struck me as astute, clear-minded and with a very good recollection of events, and above all honest in the way that she dealt with questions and the position of Serisys

while she was a director. She accepted that she was very experienced in the trading of financial products in Asian and US markets, and knowledgeable about the back office functions of financial services companies. She had had experience of China-based start-up companies (akin to venture capital) and Silicon Valley-type investment disciplines. She considered that it was normal for start-ups to be perpetually needing cash.

67. She was first recruited as a consultant, under a Referral Agreement signed on 21 July 2016 for a term of 12 months, and invested US$105,000 in shares in SGL. She was then appointed a non-executive director of SGL in April 2017. Mr Marsh and Ms Sun had met in 2015, when Ms Sun was working as COO of the Hong Kong subsidiary of a Chinese brokerage firm, Huatai. Mr Marsh was interested in benefiting from Ms Sun's financial and investment contacts, including at NordEngine Capital (NordEng"), Huatai and AMTD, who were potential investors or customers, or both. As far as investment was concerned, she recognised that they were waiting to see a signed user, but subject to that there was substantial interest.

68. SGL was the first company to which Ms Sun had been appointed a non-executive director. Her first board meeting was the April 2017 meeting. At that time, Ms Sun was seriously ill and being treated for cancer as well as caring for her ill mother. She accepted that she was not diligent during the summer of 2017 and was only looking at the big picture. She said that she would normally read all board papers, but was not doing so while undergoing treatment. Further, as a new member of the board, she did not see it as her role to audit decisions if she had nothing to add on a particular matter. At the August 2017 board meeting, she said that there were 3 executive directors and a major shareholder present, and she deferred to what they said.

69. As far as the assignment of the IP to SAHL was concerned, Ms Sun said that it was presented as something that SGL had taken legal advice about, had been talking about doing and was finally getting round to doing it, characterising it as a legacy issue. She was unaware of the exact financial position, or of issues of insolvency, though she knew that questions of funding, and shortfall of funds, was a constant subject of discussion. Indeed, she lent SGL money on 31 August 2017 to alleviate its shortage of funds. Her role was to find sources of funding in Asia, and her time (when she was back in Asia) and energy were focused on meeting new potential investors.

70. Ms Sun did not attend the October 2017 board meeting as she was in the US tending her ill mother at the time, and still recovering from her own treatment. She was alarmed by the email about inability to pay the Watford staff and rent in late October 2017.

71. I find Ms Sun to have been a truthful witness. I accept her evidence that she was considerably distracted from her role by her mother's and her own serious illnesses. Although she came across as a conscientious and hard working person, I accept that she was not able to perform a fully effective role as a non-executive director during 2017.

IV. The IP Rights owned by the Company

72. The Company, owned at the time by SSL, was working from about 2013 on creating Adypt. Adypt was a complex computer programme, written in code and stored on the cloud. It is designed to enable huge numbers of transactions in financial products to be

processed in real time on a single model, and audited, and to support bespoke applications for particular users. The programme is intangible property.

73. The Company was acquired from Dr Rhodes for the purpose of developing Adypt. It had 6 employees, including Richard Barnes and Keith Ballard, who were the principal developers of the programme, and Darren Hurt. They had previously worked for a different company owned by Dr Rhodes, as principal developers of an earlier similar, but less sophisticated, software product, SYN~. The Company did not have other workstreams.

74. It is common ground that, by August 2017, Adypt comprised four layers: a platform layer, referred to by the expert witnesses as the M3 layer; above that, a modelling repository, referred to as M2; then an applications framework, referred to as M1, and the applications or extensions to the framework themselves, which were business specific, referred to as M0. It was also common ground by the end of the trial that the Company had had no involvement in developing the business-specific applications (level M0) – this was SSL's work.

75. During the course of the trial, I was referred to a number of documents produced by Serisys that describe the product. One, dated June 2014, called "Build notions 1", describes the architecture of Adypt as like a tall building with substantial foundations and an impressive structure on top. The foundations were described as "the Adypt engine", comprising a platform developed by Richard Barnes and an application framework developed by Keith Ballard. The applications themselves were described as being designed and written by Hong Kong. The document explained that what was done at the platform level was unchangeable and was part of the product for life. It also recognised that many more man years of work were required to write the applications themselves. This would explain why SSL in Hong Kong had over 20 employees, whereas the Company had only six, then seven at a later stage.

76. A later document called "ADYPT Overview" dated June 2015 is a marketing document that explains to potential licensees how Adypt works. It includes a graphic that identifies the different layers of the software and describes the Engine and applications framework, or Platform, as having been built by the platform team in the UK, and the applications as being built by applications teams in Hong Kong and Bangkok. A further version of the same promotional document dated September 2016 contains a different graphic identifying the "technology" as being the platform comprising the engine and application frameworks and the "business process" as being the Adypt business applications. Both are governed by the modelling suite, which "defines and persists metadata for all aspects of the system".

77. A business plan for SGL dated 1 March 2019 states that the technical architecture of Adypt was designed from the bottom up to provide the ability to model all aspects and features of the platform, with large parts of an individual customer solution being inherited from pre-existing applications frameworks, and integration with other systems using application frameworks dedicated to integration. In other words, a customer, whether a bank, an exchange or a broker, can use the existing M3, M2 and M1 levels of the system to develop their own particular "extension" or "application", which can be integrated with other such applications built on the same framework.

78. By the Assignment of 30 August 2017, the Company assigned its entire right, title and interest in the Intellectual Property, which was defined as patents, rights, copyright, trade marks and other rights and goodwill in the Products, which included the Adypt product known as "Adypt" or "Adypt Cloud", in whatever form of code it was written, including all associated documentation (whether human or machine readable), manuals and materials associated with Adypt.

79. Accordingly, whatever IP rights the Company had in Adypt, it assigned them all to SAHL. SSL and SAHL made a substantially identical deed on the same day, as part of the same transaction. SSTL and SAHL did so later, on 14 September 2017.

80. The consideration for the Assignment was stated in clause 3.1 to be the grant of a worldwide, non-exclusive, royalty-free licence to use the IP for a period of one year in connection with the Company's business and operations. No other consideration was expressed, and it is not contended that any was implied or given. Accordingly, the Company had no right under the Assignment to develop Adypt. The Assignment says nothing about who would do so, or on what terms. The inference based on the Assignment was therefore that SAHL would take over development, but SAHL had only been incorporated 3 days previously and had no employees or capital.

81. The rights granted to SAHL under the Assignment were themselves assignable, but the benefit of the deed to the Company (viz the user licence) was not assignable.

82. Since the Company's business had been limited to the development of Adypt, it follows that, following the Assignment, the Company had no business save in so far as SAHL or SGL permitted it to continue to develop Adypt on behalf of SAHL - unless it started some other business-like endeavour. The Company had no use for a one-year licence of Adypt because it had no business in which to use it: it had been a research and development unit funded entirely by SGL.

83. The central question in this case, to which the identity of the Company's IP rights is material, is what value they had at the date of the Assignment, and whether this was substantially less than the value of the one-year licence. As the Company had no other business and no use for the licence and the licence was non-assignable, the value of the consideration provided to the Company under the Assignment was effectively nil.

84. This was ultimately not disputed by the Defendants. However the THDs' case (adopted by the JPPDs) is that the value of the consideration provided by the Company was also nil. They contend that the Company had nothing but a share of ownership of software, which share was worth nothing as it could not be independently realised for value. Alternatively, they argue that GHSL has failed to prove precisely what the Company independently owned and that accordingly it has failed to prove ownership of any IP that had any realisable value.

85. GHSL's pleaded case refers to what was developed by the Company in Watford as "AdyptUK", describing it as a software platform with modelling repository but also including around 90% of the applications frameworks and over 50% of the extensions. "AdyptHK", i.e. what was developed by SSL, is described as comprising applications, amounting to around 10% of the general applications framework and less than 50% of the extensions. It is then pleaded that AdyptUK was built separately from AdyptHK and "could be licensed standalone or as part of a joint product licence with [AdyptHK]".

86. Throughout the trial, GHSL tended to refer to the M3 and M2 layers together as "the Platform" or "the Engine", though these terms were not consistently used. It is pleaded that it was a version of the Platform that was offered to the LSEG in 2017 as a development licence, for it to develop its own applications.

87. A version of the M3 and M2 layers, representing what existed in March 2019 and excluding any edits or imports done by an SSL employee, was provided to Dr Marshall, GHSL's expert software development witness, as a standalone repository, together with all other software files, for him to consider to what extent the Platform (or Engine) could be licensed separately from the M1 layer.

88. Dr Marshall's analysis of all the files committed to the Git platform (a cloud-based source code management system) reveals that none of the commits at M3 level were done by SSL employees, 7 out of about 1,600 at M2 level were done by SSL employees, and a little less than a quarter out of a total of 4,654 edits and imports at M1 level were done by SSL employees. However, in copies of the code derived from two workspaces operated by Company employees, Dr Marshall identified that at M3 and M2 levels all of the files were written by employees of the Company, with a small number of files at M1 level imported or edited by SSL employees.

89. The THDs' pleaded case is that AdyptUK, as described in the Particulars of Claim, has never existed, as Adypt:

> "was designed, created and developed by a number of employees of SL and SSL jointly and working in close collaboration over several years. Each of these employees entered into agreements to transfer the intellectual property created by them to their respective employer, either SL or SSL, in 2016. The intellectual property in Adypt was held jointly by both SSL and SSL and the intellectual property they each created is inseparable and indistinguishable from the software created by the other. As such, SL's interest in Adypt could not be used or sold without infringing SSL's intellectual property rights".

Further, it contends that there was no practicable way of identifying specific intellectual property belonging solely to the Company, or of separating or extracting the Company's interest from the whole.

90. The THDs contend that SSL employees worked on the applications framework and the applications, and that the Company's interest in Adypt could not be licensed on a standalone basis, and that only key employees of the Company and SSL (unidentified) could operate the software.

91. The THDs called no expert opinion evidence to support their case on software development, licensing of the Platform, or the value of the IP that the Company owned (whether jointly or severally).

92. It is not disputed by the Defendants that the principal rights over the software code with which the Court is concerned is copyright. Copyright attaches to the authorship of an original work, including computer code. The immediate authors of various files of the software were the individual employees of the Company, and of SSL, acting in that capacity. Prompted no doubt by Dr Rhodes's claim in 2015 of entitlement to rights in the

software, and for the avoidance of doubt, both the Company and SSL required their employees to assign to each of them respectively any individual copyright or other rights that they might have in the Adypt software. Contrary to the THDs' pleaded case that the code was developed and owned jointly, these transfers are consistent not with joint ownership of rights in the software but with individual rights and ownership of work contained in particular files.

93. In other respects too, the conduct of the parties during the period 2013 to 2017 recognised the different ownership interests and responsibility of the two companies, save as regards the applications framework and/or applications. On 3 November 2015, Mr Rowland emailed a solicitor at Bird & Bird, Hong Kong, saying: "We currently understand the ADYPT IP is held in Serisys Limited in London and Serisys Solutions Limited in Hong Kong, because these are the two entities that employ the people developing the solution". The email was written to ask whether there were advantages in consolidating the IP or whether it was normal to have it "geographically fragmented". On 15 February 2017, Mr Marsh emailed "all" on the Serisys domain identifying the list of his direct reports. These included Richard Barnes, said to be responsible for the Adypt Cloud platform, and Keith Ballard and Derek Ng "who continue to share responsibility for the ADYPT CLOUD Applications Frameworks and Applications". Mr Marsh said in evidence that "the work that Watford was doing had value and that value exceeded the cost of performing it", and Mr Harrison referred to the product of the Watford team, who at one stage were in danger of going unpaid, as "the main asset".

94. There was no contemporaneous agreement on, or document asserting, joint copyright or joint ownership of the software that was drawn to my attention. Since copyright follows authorship, the copyright would be with the author or the company that employed them, unless something different were agreed. It is perhaps unsurprising that – until the liquidation of the Company – the question of which company owned what was not examined, as the rights of the Company, SSL, SSTL and SAHL were controlled by SGL. Contrary to the THDs' submission, the fact that each trading entity tended to identify itself and its business by the general name "Serisys" does not give any indication that the principal assets of each individual subsidiary company were jointly owned.

95. Permission was given to GHSL and to the Defendants collectively in this case to serve and call expert opinion evidence in three separate disciplines: software development, intellectual property valuation, and valuation of software development services. It was understood that it was likely to be the THDs instructing and calling the Defendants' expert witnesses because the order in question allowed the JPPDs, if so advised, to apply later for permission to call their own expert or experts.

96. The issues to which the reports of the expert witnesses were to be confined were stated in the order as:

"(1) <u>Software development</u>

1. Relevant technical background on the Adypt software, including applications, application frameworks and platforms.

2. Analysis of the Adypt software and any version control system to ascertain:

    a. The development of the Adypt software, including changes made; and

b. The contributions and identities of the individuals responsible.

(2) Valuation of intellectual property

3. What valuation methods (if any) should be used to value IP owned (a) solely; and (b) jointly?

4. What was the value (if any) of SL's rights and interests in (i) AdyptUK as alleged by the Claimant; or (ii) Adypt jointly owned with SSL as alleged by the Defendants as at:

a. 30 August 2017 …..

b. 27 March 2019 ….

c. The date of trial ….

(3) Valuation of software development services

5. What was the value of SL's software development services provided to [SAHL] in the period from 30 August 2017 to 27 March 2019?"

97. The only expert witness on software development was Dr Richard Marshall, who was called by GHSL.

98. Dr Marshall's expert report explained the process of software development and the model-based architecture used in Adypt. It expresses support for GHSL's view that a "platform" is the set of tools and components that can be used to create final applications, excluding the applications themselves. He explains how the creator of code can be identified from the data in the Git files.

99. Dr Marshall was provided with code repositories from two employees of the Company and confirms that he was not provided with files from workspaces of SSL. In addition, he was provided with a standalone version of AdyptUK excluding any SSL files, with instructions from GHSL as to how to operate it, prepared by Darren Hurt in January 2026. It is from analysing the employees' repositories that Dr Marshall was able to say what proportion of commits at each of the 3 levels (M3, M2 and M1) was made by SSL employees (assuming, in favour of the Defendants, as he did, that unidentifiable commits were made by employees of SSL), and that an Adypt application could be built and run on a version of code that excluded any code developed and saved by SSL employees, meaning that the Platform had independent value:

> "My analysis of the built and deployed standalone application demonstrates that there is no requirement for code that was built or modified by SSL developers. ADYPT and its development environment Adyptable can absolutely be used to create applications without the need for code or models created or modified by SSL developers."

100. Dr Marshall also concluded that:

> "The vast majority of activity relating to the ADYPT Java source code was performed by [the Company's] developers, and exclusively so for the

> [Modelling Repository and Platform Level];
>
> The vast majority of activity relating to the ADYPT models at levels M1, M2 and M3 was performed by [the Company's] developers, overwhelmingly so at level M2 and exclusively so at M3".

101. Dr Marshall was challenged on the limits of his knowledge about the extent or completeness of the material with which he was provided by GHSL. He accepted that he had not analysed the entirety of the Adypt software and that other local versions of it, apart from those provided to him, could exist. He accepted that he was dependent on what had been drawn from the workspaces of Mr Ballard and Mr Hurt as being representative of the state of development in 18 different repositories of code. He was unable to say exactly how Mr Hurt had prepared the standalone version of the platform and modelling repository, and accepted that this did not take into account the applications framework. He acknowledged that he was assuming that this repository was representative of the Adypt system at the relevant time.

102. Dr Marshall was taken to a spreadsheet produced by Mr Ballard, on which the THDs relied to seek to show that substantial work was being done by SSL employees. It attributes work on 24 out of 47 items to SSL and only 13 to the Company. Dr Marshall accepted that he was not in a position to say which items in this worksheet were considered to be the most or least important, or which lines of code they related to. However, this spreadsheet was produced by Mr Ballard and sent to Company and SSL employees, Mr Marsh and Mr Rowland with the comment: "There's an update to the application framework plan for the call tomorrow in the attached [spreadsheet]. I've taken the chance to hide a lot of the completed items and unused cells and add information for the forthcoming items as comments." The spreadsheet therefore relates to level M1 and is likely to omit the earlier, completed work at this level. In any event, it is not in dispute that level M1 was contributed to by employees of the Company and SSL. I accept, however, that it tends to undermine GHSL's pleaded case that the Company was responsible for developing around 90% of the applications framework, although no precise assessment is possible.

103. Dr Marshall was criticised by Mr Smith for not annexing to his reports the outputs from the scripts that he had used to extract information from Git in place of the open-source tools suggested for use in his instructions. He accepted that he had not done so. I do not consider that any inference materially adverse to Dr Marshall follows from this fact, though he should have made the reports available, or at least indicated in his report their availability.

104. Dr Marshall was also criticised for making assumptions that the material supplied to him represented the state of the software at a relevant time, without any evidence to prove that. He said that he believed it represented an effort to recover what was available and accepted that it was entirely possible that there were more files for the applications framework in other repositories used by SSL employees. However, no such repositories containing other code – which would at all times have been available to the THDs through SSL and SAHL – were identified or disclosed by them during the course of the litigation, so the likelihood of other files existing that would significantly undermine the validity of Dr Marshall's opinions is more theoretical than real.

105. As part of GHSL's disclosure, the same zip file of all the files that were provided to Dr Marshall was disclosed to the Defendants. This included the documents produced by Mr Hurt and Mr Ballard, including the files for the working standalone version of Adypt. Further, SAHL has control of the full Adypt code. Accordingly, the THDs have had every opportunity to establish, if it were the case, that further relevant files were omitted from what was provided to Dr Marshall. They have not been able to identify any such files.

106. Dr Marshall was then criticised for going beyond the permitted scope of his instructions by giving an opinion on whether the Platform has independent economic value. Whether the Platform had independent value was not a question that he was expressly asked, though of course he was asked to evaluate the creation, ownership and significance of what GHSL referred to as AdyptUK, which would depend on what it contained and how it could be used, including whether it could in practical terms (as well as in terms of ownership rights) be used independently. In response, Dr Marshall said:

> "The point is that you can use the platform independently of the applications sitting on top of it, which I chose to the use [sic] the terminology of 'independent economic value'. It is one I'm familiar with. So that's the reason for the use of the language."

Dr Marshall added that he had not opined on the question of what value it had, which was an issue for a valuer.

107. Mr Smith took Dr Marshall to the terms of the permitted issues on which expert evidence could be admitted and pointed out that there was no reference in them to whether AdyptUK had independent economic value. Dr Marshall agreed that there was no reference there to value, but said that, in his view, the question of whether AdyptUK could be used independently was included in the relevant technical background to the Adypt software, and that by using the term "independent economic value" he was not talking about a valuation issue. He was simply examining whether the platform could be used separately. Mr Smith suggested to Dr Marshall that his addressing the issue of independent economic value showed that he was seeking to be an advocate for GHSL's case, to which Dr Marshall said, with indignation, that he took great exception.

108. In my judgment, in examining and expressing an opinion on whether the Platform of Adypt could be used separately from the applications level of software, Dr Marshall was not acting beyond the scope of his expertise or beyond the permitted expert evidence issues, much less the pleaded issues. The issue of (allegedly) improper content of the expert evidence had not been raised after service of the report, as it should have been raised, with those representing GHSL, rather than solely with the witness in the witness box. This was, in my view, a rather desperate attempt by defendants who, for whatever reason, had chosen not to call expert evidence, to knock holes in the opposing case or to undermine the credit of the witness. While in general those are legitimate exercises in litigation, allegations of impropriety need to be both soundly based and raised in the right way. Any suggestion that (in effect) GHSL was seeking to adduce inadmissible evidence should have been raised in good time. In any event, for the reasons that I have given, I do not accept that as a result of using the phrase "independent economic value" to describe the viability of parts of the software for which the Company was exclusively responsible, Dr Marshall was stepping outside his proper remit, much less acting as a hired gun to advance the case of those instructing him.

109. Dr Marshall was in fact an impressive witness, who was clearly an expert on the matters that he addressed, and whose report – once explained to a non-specialist – can be seen to be compelling. There is no proper basis to consider that he acted on inaccurate or incomplete material supplied by GHSL for his work. If that were the case, the THDs would know and would have been able to prove it in evidence. They did not attempt to do so. Accordingly, I accept the opinions of Dr Marshall.

110. It is self-evident that the original work of the Company's employees generated copyright in that work, each part of which was committed to Git in the name of its author. Absent any agreement (not pleaded or proved) between the Company and SSL to share ownership of what each created, the copyright would belong to each company (subject to the terms of the contracts of employment). SGL recognised this by requiring employees to assign any rights they individually might have to their respective employers, not to the Company and SSL jointly or to SGL. While it may be true that the entirety of Adypt could not be effectively licensed by the Company or SSL acting alone, that does not mean that the IP was jointly owned, or that what the Company in fact owned could not be licensed separately, provided that it could practically be separated from what SSL owned. Dr Marshall demonstrates that this is the case, so far as the Company's IP is concerned, because the Engine had independent value, but not so far as SSL's IP was concerned, because the applications could not run without the Engine.

111. Dr Marshall's evidence does not prove the entirety of GHSL's pleaded case. It does not establish that the Company's employees were responsible for creating around 90% of the applications framework or over 50% of the applications software. GHSL has failed to prove that any of the applications software was coded by the Company's employees, and it appears that more than 10% (perhaps significantly more) of the applications framework may have been created by SSL employees. The THDs submitted that I should dismiss the claim based on AdyptUK for essentially that reason, namely that there is no pleaded case that the Platform, or Engine, was solely created and owned by the Company and that this could be licensed on a standalone basis.

112. I do not accept that argument. At a pleading level, the fact that AdyptUK, as defined, is not proved to be as extensive as was claimed, does not mean that GHSL cannot fairly advance its case based on what is proved to be the product of the Company's sole work. The greater includes the lesser in this context, and it was in any event pleaded that AdyptUK included the platform and modelling suite.

113. I accept that in a normal copyright claim, it would be of the greatest importance to define with precision what the work was in respect of which the claimant claims copyright. But that is not directly an issue in these proceedings. The issue here is whether what the Company assigned to SAHL, whatever it was, had substantially greater value than nil. What matters, therefore, is whether the Company had any separately owned IP that could be assigned by the Assignment, and, if so, whether that property had a substantial value. The question of what the Company owned and what value it had were live issues, but the THDs elected not to call expert evidence to support their case that everything was jointly owned, or their alternative case that whatever the Company owned could not be separately licensed in practical terms and therefore had no value.

114. The Re-Amended Particulars of Claim plead that development licences for the Platform, without applications, could be sold, and that in 2017 the London Stock Exchange and the Deutsche Börse were being offered only the Platform for development. That is sufficient

to entitle GHSL to maintain a case that the Platform, or "Engine" in which it had the copyright had independent value, even if it has not been able to prove how much of the M1 level of software was the product of the Company's work.

115. The fact that the "Engine" had significant independent value is evidenced by an exchange that Mr Hubbard and Mr Marsh had as far back as 30 January 2015. In response to a question "are you going for Tier 1 customers already?", Mr Marsh replied "We are going after Tier 1 customers now. This is possible because we can sell the ADYPT engine and development environment to them so they can build their own applications … These sales take 12 months which is why we must start now. [Barclays Capital] will visit Watford on March 3". Further evidence is contained in Mr Rowland's email to Bird & Bird dated 4 December 2015, in which he explained that SSL employed 22 people developing the applications in Adypt, whereas the Company employed six people developing the "engine" on which the Adypt applications run.

116. While it is clear that prior to March 2019, when the Company ceased to work on Adypt, Hong Kong employees of SSL did contribute work on files for the applications framework, there is no evidence, beyond what Dr Marshall could find in the shape of 4 imports and 3 edits at M2 level out of a total of 1,600 files that they did so in relation to the platform or modelling suite. The functional standalone repository tested by Dr Marshall demonstrates that these few files were non-essential.

117. As regards the value of what the Company owned, the failure of GHSL to prove at trial precisely the extent of the Company's IP rights as at August 2017 might have presented a difficulty in placing a value on its interest, if it depended on what exactly the Company had created or what could be sold or licensed. However, as I will explain in the next section, the expert valuers agree that the cost approach to market value is appropriate, and so, on the facts of this case, where the Company was a developer of Adypt and nothing else, that difficulty falls away. The Company assigned all the IP that it had, and what it had is to be valued by reference the cost of work done by the Company's employees and Dr Rhodes. The inability to define exactly what was assigned may though be of significance for the question of what relief it is appropriate to grant GHSL, if its case on TUV succeeds.

V. The Value of the Company's IP

118. In this section, I shall address the value of the Company's IP at the date of the Assignment, at the date when the Company went into compulsory liquidation, and at the time of the trial, i.e. its current value. I will also make findings about the value of the development services that the Company provided to SAHL, as assignee of the Company's and SSL's IP, from September 2017 to March 2019.

119. As a result of those development services, Adypt continued to be developed after the Assignment. The evidence did not explain in detail on what levels of the product the work was done. However, if, as I have found, by August 2017 the Company had developed levels M3 and M2 so that a standalone version existed that could be used to create applications, it is a reasonable inference that work after August 2017 was focused on the applications framework (level M1). This would also be logical as, from July 2017 onwards, Serisys was actively pursuing the grant of development or user licences to

identifiable organisations, or at least types of organisation, and so was focusing on the framework that was necessary to support applications of a particular type.

120. I have explained the directions that were given for expert valuation evidence. Shortly before exchange of expert evidence was due, the THDs confirmed that they were not instructing expert witnesses at all. As a result, the JPPDs decided that they wished to instruct a valuation expert. The parties agreed directions to enable that to happen, the result of which was that valuation evidence was exchanged only shortly before the pre-trial review. GHSL served a valuation report of Dr Vasconcellos PhD, MRICS, and the JPPDs served a report prepared by Mr Stephen Robertson LLB CA.

121. There was then difficulty with the preparation of a joint statement of the kind that is regularly directed in order to assist the Court to understand the nature and extent of any disagreement between the expert witnesses. Despite the explicitly clear list of issues that the experts were to address, neither of the valuation experts appeared to have been instructed to value both AdyptUK (i.e. the Company's independent rights, as alleged by GHSL) and jointly owned Adypt.

122. Dr Vasconcellos's report valued AdyptUK and the software development services provided by the Company after 30 August 2017 but not Adypt as a jointly owned whole, whereas Mr Robertson valued Adypt as a whole and provided an opinion on whether the Company could properly claim any part of that value. Dr Vasconcellos opined that the value of AdyptUK as at 30 August 2017 was in a range of £2.23 million to £2.51 million; Mr Robertson opined that the value of Adypt at that date was in a range of US$765,000 to US$815,000, and less than half of that by March 2019.

123. A joint statement was produced dated 17 April 2026, ten days before the start of the trial. This extended to 62 closely typed pages, containing relatively little agreement, other than about high level principles, and containing much disagreement and argument. One matter that was agreed is that the cost approach to market value or fair value was the most appropriate and primary method of valuation to use in the circumstances of this case, rather than a market approach or an income approach.

124. At the start of the trial, I directed a further meeting at which the valuers should address some obvious issues, including the alternative valuation case that each had not addressed, but this meeting did not take place. I was told that Mr Robertson had declined to meet Dr Vasconcellos unless answers to some questions were first provided to him by Dr Vasconcellos. Instead, each expert provided a supplementary report, shortly before they gave evidence in court. In Dr Vasconcellos's case, this provided a valuation of Adypt as a whole at the three specified valuation dates and assessed a proportionate share of it attributable to the Company; in Mr Robertson's case, it valued AdyptUK and concluded that the Company's share of that value was nil.

125. In response to my request for a short joint statement, summarising what could be agreed and the essence of the disagreement in not more than five pages of text, the parties themselves rather than the expert witnesses provided a very helpful document, summarising the range of values on each valuation exercise and the main points on which the valuers disagreed.

126. In his expert report, Mr Robertson had addressed only the combined value of Adypt. His supplementary report addressed AdyptUK. He concluded that different approaches to

valuation were needed at different dates and for different property. For Adypt and AdyptUK at August 2017 and for Adypt in May 2026, he used the "fair value" basis of value, using the cost approach; for Adypt in March 2019 he used an "in situ" basis and for AdyptUK at that date and in May 2026 an "ex situ" basis, as the Company was no longer a going concern. That was, he considered, the right way to reflect the distressed circumstances in which the Company would notionally be selling its IP. The difference came at the stage of applying a further discount to the figure derived from the cost approach.

127. Mr Robertson concluded that the Company's share of that IP was worth nothing on any of the valuation dates. That is because he formed the opinion, expressed in his report, that the Company has no rights or interests in the IP rights relating to Adypt. The basis for that opinion is expressed to be that: (1) the Company was a fully-funded R&D centre at all times; (2) the Company's auditor confirmed that it was not a viable commercial entity; and (3) the Company did not assume any of the risks associated with the development of Adypt as it was fully funded by SGL (group accounts showing accumulated losses of US$37.9 million as at 31 August 2017). For the March 2019 valuation date, Mr Robertson noted that the Company had no rights in relation to the further development of the IP since August 2017 as the development was under licence from SAHL and, from September 2018, without licence and therefore unlawful.

128. As to the value of Adypt as a whole, Mr Robertson notes that the development costs were not capitalised in the statutory accounts of the Company or the group accounts. He considers that the inability to assess the commercial viability of Adypt meant that it was subject to a high risk of obsolescence, which negatively impacted the value of the IP, as did the inability of SGL to convert the potential of Adypt into a commercial transaction. At the March 2019 valuation date, AdyptUK was distressed and the asset was to be valued on an ex situ basis, reflecting the need for an accelerated realisation (within 3 months). The values were further reduced by him on that account.

129. Mr Robertson's fair value values for Adypt as a whole were in a range of US$765,000 to $815,000 in August 2017 and US$333,000 to $364,000 in March 2019. Fair value is not a basis of value defined by the International Valuation Standards: it is a financial reporting concept identified in the International Financial Reporting Standards. It is, however, essentially similar to the IVS market value basis of valuation. Mr Robertson's figures include discounts for obsolescence for all valuation dates of at least 90%, based on an expected short life span of the technology.

130. I have no doubt that if any valuer had presented Mr Robertson's valuations to Mr Marsh and Mr Rowland at or about the valuation dates in question they would have thought that the valuer had taken leave of their senses. Mr Marsh considered the potential value at the time to be over US$100 million. The shareholders of SGL had invested tens of millions of dollars in the development of Adypt and considered (based largely on Mr Marsh's assertions) that it was on the verge of generating substantial income from development licences granted to international banks. In different circumstances, in this litigation, they are however content to rely on Mr Robertson's low values.

131. Mr Robertson is not a qualified valuer. He is a certified accountant. He has substantial business experience in advising on IP strategy and delivering due diligence-led IP valuations. He said that his firm, Metis Partners Limited, has a unique proprietary in-house database of IP sales and collated third party IP merger and acquisition data. As

part of his assessment of fair value as at March 2019 and the date of trial, he used Metis Partners' proprietary "risk scorecard", developed to capture, appraise and estimate the likely recovery value from sale of IP in financially distressed circumstances. But the way that that risk scorecard works was not disclosed to the court, or to GHSL's expert, Dr Vasconcellos. Mr Robertson effectively asked the court to take its secret methodology on trust.

132. In his supplementary report, Mr Robertson valued the Company's share of the Adypt IP. His report, oddly, seems to provide two separate values for each valuation date.

i) The first value for each date is derived from an assessment of the value of what the Company contributed to Adypt by way of its development work, using the same cost approach to fair value as he used in his original report to value Adypt as a whole.

ii) Starting on the August 2017 valuation date with a hypothetical development team who would need to work for 4.3 years, Mr Robertson identifies a cost to reconstitute the Company's share of the Adypt IP as being between about US$3.97 million and $4.24 million, net of tax, using an IRR of between 16 and 17.8%, and then discounts that cost by 90% for obsolescence, assuming a useful life of the reconstituted IP of only 4.8 years, thereby giving a range of *in situ* values of between $386,000 and $412,000.

iii) For the March 2019 valuation date, Mr Robertson (for reasons unexplained) only valued the additional contribution to Adypt carried out between August 2017 and March 2019 (at a cost of $1.61 million) but nevertheless posited a work time of 5.9 years and a useful economic life of 6.4 years, which is clearly the aggregate for the total contribution, not just the 18 months of work from August 2017. With the same tax rate, a higher IRR, a higher obsolescence discount and a further discount generated by the Metis Partners' risk scorecard, the exercise produces a range of net values on an *ex situ* basis of between $58,800 and $64,200 only. It is, I think, unnecessary to address the trial date valuation in any detail, save to say that it is well below $10,000.

iv) The second value for each date appears to be a subjective assessment of the value of the Company's claim to rights or interests in, or a share of, the Adypt software that it created. That value is stated to be nil on all valuation dates.

v) In this regard, Mr Robertson notes that it would be typical, on an intra-group transfer of IP, for an assignment to state the consideration paid by the assignee, but that no such consideration is stated in the Assignment. Nevertheless, he attributes his opinion of nil as at August 2017 to the three "critical" factors identified in [127] above, and states: "and therefore SL should not have had any reasonable expectation of receiving further economic benefit beyond SGL's funding of trading losses, and subsequent forgiveness of debt". In fact, there was no debt forgiveness, but Mr Robertson seems to form his opinion as if there had been.

vi) In doing the same exercise for the March 2019 valuation date, Mr Robertson explains what he has valued, namely the source code developed between August 2017 and March 2019, and then sets out reasons why, in his view, that IP would have nil value. These are essentially the same as for the 2017 valuation and, in addition, that what the Company developed was either done under licence to SAHL or was done unlawfully, so that the Company could have no rights in the IP that it created.

133. Dr Vasconcellos, who is a partner of S&W Group LLP, valued the Company's IP on a market value basis, using the cost approach rather than the market transaction or income approach. He took a more conventional approach to the valuation than Mr Robertson and applied a consistent cost approach on all valuation dates, making different allowances for obsolescence and risk to reflect the financial distress of the Company and SGL and its other subsidiaries in 2019 and 2026. Dr Vasconcellos is a chartered surveyor with extensive valuation experience. He valued the Company's IP by using the Company's accounts, deriving the wages and salaries paid to its employees – who solely worked on developing Adypt – and an allowance for the contribution of Dr Rhodes, who was not remunerated. He made what he considered to be a generous allowance of 10% for the possibility that, from time to time, employees may have spent time on things that did not directly advance the development of the software itself.

134. Dr Vasconcellos adjusted these costs for economic obsolescence. He accepted that he was not an expert on functional or technological obsolescence of complex software systems. He assumed that there was none, only economic obsolescence, as at August 2017, when Adypt was still under active development. Taking into account the uncertainty of the Company's and SGL's financial positions at that time, he considered that an allowance of between 10% and 20% for economic obsolescence was appropriate. As at March 2019, he recognised that Serisys was in serious financial distress and that Adypt was not being commercialised. Those significantly increased the risk that Adypt could not be exploited in the way that was intended. He did not consider that a different approach to valuation, such as an *ex situ* or forced sale valuation, should be adopted, but that the circumstances were appropriately reflected in the adjustment for economic obsolescence. He took a range of 40% to 60% discount for economic obsolescence at that later time, but made no adjustment for functional or technological obsolescence as none had been identified at that time. By the date of trial, he accepted that there would be likely to be functional or technological obsolescence as well as economic obsolescence and adopted a rate of 75% to 95%.

135. Dr Vasconcellos's valuations are accordingly between £2.13 million to £2.39 million in August 2017, between £1.47 million and £2.2 million in March 2019, and between £180,000 and £920,000 at the time of the trial.

136. Given that both valuers have used the cost approach to valuation (depreciated replacement or reproduction cost), based on the amount of skilled work and length of time that would be needed to re-create the asset, the potential difficulty in identifying exactly the extent of the code written by the Company's employees in order to value it falls away. That is because the employees of the Company only spent their time from 2013 to 2019 designing and creating software for Adypt. The time that they spent is, accordingly, an accurate measure of the cost of creating whatever in fact the Company created and owned, and so, once appropriately discounted for obsolescence and risk, is a valuation of the IP that the Company assigned to SAHL in 2017 and had created by March 2019.

137. Unlike Mr Robertson, Dr Vasconcellos also valued the software development services that the Company provided to SAHL following the Assignment. These were valued not

as an asset, which they are not, but on the basis of their economic value at the time that they were provided ("cost plus"). The valuation is based on the actual costs incurred by the Company, as shown in its accounts, plus an allowance for overhead costs and a mark up of 10%, which Dr Vasconcellos says reflects a market approach to providing services where a service provider charges for services on an arm's length basis, reflecting overhead costs and delivery risks.

138. The valuation is £1,317,262, comprising wages and salaries of £884,408, overheads of £313,103 and a cost-plus mark-up of 10%.

139. I have no hesitation in preferring in principle the valuation of Dr Vasconcellos, for the following reasons:

i) Dr Vasconcellos provided a detailed and careful report specifically addressing the value of the Company's IP in Adypt with full reasons, and his valuation is a conventional approach to valuing IP and development services.

ii) Dr Vasconcellos is a valuer who has conducted a valuation exercise. Mr Robertson is an accountant who in reality has conducted an exercise of assessing what might be considered, on an intra-group basis, to be the fair value that should be attributed to the Company's share of the IP rights. While that approach might have some merit when considering the appropriate apportionment of jointly held group assets, it was not appropriate for valuing the separate interest of the Company.

iii) Mr Robertson addressed the appropriate interest to be valued (as I have found) only at a late stage, and declined to meet Dr Vasconcellos to discuss the right approach to valuation and identify what they could agree. His supplementary report, addressing the value of the Company's interest, is rather thin in terms of reasoning, and in various ways unexplained as to the methodology that he has applied. In particular:

a) There was no explanation whatsoever (whether by reference to SYN~ or otherwise) for the short useful life of the Adypt technology taken as at August 2017 in particular, which on his approach is the primary determinant of functional obsolescence.

b) There was no persuasive explanation of why Mr Robertson considers that functional or technological obsolescence was high, in August 2017. Although Mr Robertson pointed to the accounting convention (applied in the Company's accounts) that the costs of research and development are not capitalised until the outcome of the project is assessed to be reasonably certain as to its commercial viability, an unjustified conclusion of delay in marketing the asset, the time required for major financial institutions to evaluate new technology, feedback from one potential customer in May 2015 relating to one aspect of the functionality of the software, and unidentified global competition, none of this is convincing or begins to justify a discount of 90%. The accounting convention does not mean that it is to be assumed that there is no commercial viability, and one point of feedback at a relatively early stage of development is not a reliable indicator of obsolescence by the later valuation dates.

c) The operation of the Metis Partners' risk scorecard was unexplained, and remains a trade secret, as Mr Robertson described it. It was the outputs of this scorecard that generated the 79% discount that Mr Robertson applied for his *ex situ* valuation as at March 2019, on top of the 92.5% discount for obsolescence that he had already applied. It is therefore impossible to assess this critically.

iv) Mr Robertson has not previously given expert evidence to a court in this country. He did not appear to understand the distinction between giving his professional opinion on matters that he was instructed to address, which was what he should have been doing, and drawing his own conclusions of fact and forming opinions on other issues that were not matters for his expertise, which were not matters for his evidence. These included the question of whether Adypt was ready to be rolled out to customers – he concluded that it was not, whereas it was otherwise common ground that Adypt was ready, albeit further work would inevitably be done by and with a significant banking client on developing the application level under a development licence.

v) Further, Mr Robertson did not restrain himself from commenting and reaching conclusions on whether the Company had any rights in Adypt or was entitled to claim an interest in Adypt. His second figure for the value of the Company's share of Adypt (see [132(iv)] above), namely nil, was not a valuation at all but was his conclusion that the Company should be treated as no more than a cost centre that was entitled to be funded and entitled to have its intra-group debts forgiven – an accountancy issue, perhaps, but not a valuation of the Company's IP rights. In any event, the Company did not have its debts forgiven by SGL: if that had happened, there would probably have been no TUV claim.

vi) Ultimately, Mr Robertson accepted that he had strayed beyond his role as a valuation expert. Further, his conclusions on obsolescence were based almost exclusively on information provided to him outside the litigation process by Mr Porter and Mr Harrison, rather than being his own assessment.

vii) Mr Robertson did not rely on actual salary data (which was available and was the best evidence) when assessing costs of reconstituting the Company's software. Dr Vasconcellos used actual data, adjusted for time and checked against market rates for such skilled employees.

viii) Dr Vasconcellos' report is extremely thorough and careful, involving cross-checking against other data and valuation methods where possible. I find it persuasive, but have reservations on one question.

140. The area of Dr Vasconcellos's opinions that I find difficult to accept without further consideration is his decision to make no adjustment for functional or technological obsolescence in August 2017 and March 2019. If (which was not challenged) it is appropriate when assessing value based on the cost and time of reconstituting an asset to consider the effect of time running from the valuation date, and four or more years' work would be required to reproduce the code, it seems to me inevitable that there will be a risk of some functional or technological obsolescence that needs to be factored in, in addition to economic (external) obsolescence. Dr Vasconcellos frankly accepted that he did not have the technical expertise to assess those factors, but nevertheless I consider

that some allowance should be made, as I feel that he would have done so had he possessed the necessary evaluative expertise.

141. In order to do so, and without substituting my own lack of relevant expertise for Dr Vasconcellos's, I will first take for each valuation date the middle point of the ranges of values that he provided (£2.26 million; £1.835 million and £550,000), and then deduct a further 10% for the August 2017 valuation and 15% for the March 2019 valuation. I considered whether to make a flat 10% reduction on all dates but consider that it is inherently likely that functional or technological obsolescence will have increased with time.

142. Accordingly, the values of the Company's IP on the valuation dates are the following:

i) 30 August 2017 - £2,034,000

ii) 27 March 2019 - £1,559,750

iii) Trial date - £550,000

143. Standing back, given the amount of the investment made and the potential income to be derived from the software, Mr Robertson's valuation of all of Adypt on 30 August 2017 in the sum of $765,000 to $815,000 strikes me as wholly unrealistic, absent a flaw in the cutting edge technology, taking into account the success of SYN~ and Serisys's strong belief that it could and would succeed and prove to be hugely valuable. In any context other than the exigencies of this litigation, I consider that Mr Marsh and Mr Rowland would find his value for August 2017 to be plainly wrong. All Mr Robertson's other valuations are downhill from that unsatisfactory starting point, and his conclusion that the Company's rights on any basis were worth nil is fundamentally flawed and wrong. Dr Vasconcellos's values, on the other hand, subject to my one further adjustment, strike me as more realistic, given that a cost basis of valuation is agreed. The significantly lower valuation in March 2019 appropriately reflects the financial distress of the Company notwithstanding the advance in development of Adypt by that date.

144. It is much more difficult to apply any sense check based on the opportunities and risks as of today. I suspect that all the parties and those backing them may disagree about the up-to-date value, but that is beside the point: the Court can only proceed by evaluating properly considered and prudent expert valuation evidence. I note that Mr Robertson's valuation of the whole of Adypt as at the date of trial is US$440,000 to $490,000, which is less than Dr Vasconcellos's valuation of the Company's interest but not too far removed from it.

145. I should record an additional point raised by Mr Smith on behalf of the THDs in opening their case, namely that since Dr Rhodes had made a claim to a share of the rights in the IP in December 2015, which had not been formally resolved, the value of Adypt would be affected by that dispute about the ownership of the IP. The point was not pursued in closing submissions, nor raised by Mr Smith with Dr Vasconcellos or Dr Rhodes. Bird & Bird, on behalf of SGL, made a compelling response on 23 December 2015 to the claim made on behalf of Dr Rhodes, pointing out (among other things) that he was a director of the Company at the relevant times and so could not set up a personal claim to IP in priority to the Company. Dr Rhodes pursued his claim no further. There is therefore

no proper basis for considering that Dr Rhodes's 2015 claim would impact on the value of the Company's IP at any of the valuation dates.

146. If, contrary to my conclusion on the nature of the Company's IP asset, all that the Company had was a joint interest in Adypt as a whole, shared with SSL, then the question would be whether that share had a value. Once again, the Defendants say "no", on the basis that it could not be used or realised without the agreement of SSL. They were forced to accept that that logic meant that SSL's interest was also worth nil, and yet, by the Company and SSL combining their interests, or one selling to the other or both selling to a third party, very substantial value would be realised.

147. Dr Vasconcellos addressed this question in his supplementary report and considered that the same cost-based approach to valuation would apply in principle, both as to the valuation of Adypt as a whole and as a basis for allocating the economic contributions to the whole attributable to each of the Company and SSL. Dr Vasconcellos considered that it would be right to apportion the aggregate value of Adypt between the Company and SSL in proportions reflecting their contributions, in terms of cost of labour, and then apply the same discounts for obsolescence.

148. Mr Robertson did not directly address the value of a joint share in Adypt, but from the content of his valuation reports it is reasonable to assume that he would consider it to be nil, on the basis that, as he concluded, the Company was no more than a cost centre fully funded (in theory) by SGL and where its only expectation in terms of return was the forgiveness of its debt. I reject that approach in principle, as it is clear that the Company was taking risks in carrying on its business in the hope that SGL would manage to provide sufficient funding, and clear that debt forgiveness was not discussed or given.

149. In principle, it seems to me to be unsound to contend that an asset that is jointly owned and is valuable has no value to any of the joint owners individually. While an IVS "market value" basis of valuation would exclude special value to particular persons, there is no contractual or regulatory requirement to value on that basis here. The reality is that a half or near half share in a valuable asset would have a realisable value, even though that value might be suppressed by the absence of a mature market in such interests. For the purposes of this claim, it is sufficient to say that, if the correct asset to be valued is a joint share in the whole of Adypt, its value would be substantially in excess of the value of the licence granted to the Company under the terms of the Assignment.

150. Finally, on the value of the development services provided by the Company to SAHL, there is no evidence except that of Dr Vasconcellos, which was not seriously challenged except on the appropriateness of a 10% uplift. Dr Vasconcellos explained that, given that he was valuing services, not an asset, he valued on a quantum meruit basis, including a 10% uplift on the cost of providing the services. As the Company in fact did not charge such an uplift nor was it lent by SGL more than the base cost, it seems to me that it is appropriate to exclude the uplift on the facts of this case, even if in other cases it would be right to include it. I therefore find that the value of the services was £1,197,511.

VI. Transaction at an Undervalue

Legal principles

151. Section 238(2) of the 1986 Act provides:

> "Where the company has at a relevant time (defined in section 240) entered into a transaction with any person at an undervalue, the office-holder may apply to the court for an order under this section."

The office-holder is the liquidator of a company in liquidation or administrator and includes an assignee of the liquidator's rights.

152. It is not disputed that, because SAHL was a person connected with the Company, the Assignment will have taken place at a relevant time if the insolvency condition is satisfied (as to which see [155] below).

153. Subsections (4) and (5) provide:

> "(4) For the purposes of this section and section 241, a company enters into a transaction with a person at an undervalue if—
>
> (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or
>
> (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.
>
> (5) The court shall not make an order under this section in respect of a transaction at an undervalue if it is satisfied—
>
> (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
> (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company."

154. It is common ground that subsection (4)(b) is the relevant limb, and so the question is whether the Company made the Assignment for consideration that was worth significantly less than the value of the IP that was assigned. On the basis of my findings, it clearly did, as the one-year user licence was worthless to the Company, and the IP in Adypt that the Company owned was worth in the region of £2 million.

155. The remaining question, apart from what remedy would be appropriate, is therefore whether the insolvency condition was satisfied at the time of the Assignment. If it was not, there is no TUV. Section 240(2) of the 1986 Act provides:

> "Where a company enters into a transaction at an undervalue or gives a preference at a time mentioned in subsection (1)(a) or (b), that time is not a relevant time for the purposes of section 238 or 239 unless the company—
>
> (a) is at that time unable to pay its debts within the meaning of section 123 in Chapter VI of Part IV, or
>
> (b) becomes unable to pay its debts within the meaning of that section in consequence of the transaction or preference;
>
> but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by a company with a person who is connected with the company."

156. Since SAHL and the Company were connected, it is presumed that the Company was unable to pay its debts at the time of the Assignment, unless the Defendants prove the contrary.

157. Section 123 of the 1986 Act provides, so far as material to this case:

> "(1) A company is deemed unable to pay its debts—
>
> …….
>
> (e) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.
>
> (2) A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities."

158. The Assignment therefore is a TUV unless the Defendants prove that, at the time of and after the Assignment, the Company was able to pay its debts as they fell due and the value of its assets was not less than the amount of its liabilities.

159. Although the statutory definition of a company that is unable to pay its debts has two different limbs, generally referred to as "cash flow insolvency" and "balance sheet insolvency", the authorities establish that they are two aspects of a single question, namely whether the company is unable to pay its debts. The company may be deemed to be unable to pay its debts if either it cannot pay debts as they fall due or, even though it can and does pay its debts as they fall due, the value of its assets is less than the amount of its liabilities. Similarly, the value of the company's assets may exceed the amount of its liabilities and yet the company may be unable to pay its debts as they fall due.

160. The leading case is BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3 BL plc [2013] 1 WLR 1408 ("*Eurosail*"), where it was explained that the test in s.123(1)(e) is concerned with ability to pay debts generally, in the reasonably near future, and that beyond whatever on the facts of the case is the reasonably near future it becomes inappropriate to attempt to assess whether debts will be paid as they fall due. The focus is then on a comparison of assets and liabilities, future and contingent, making full allowance for contingencies and uncertainty. However, the longer into the future one has

to look at liabilities, the less appropriate it would be to declare unable to pay its debts a company that is in fact paying its debts as they fall due.

161. In *Eurosail*, Lord Walker of Gestingthorpe JSC (with whose judgment Lord Mance, Lord Sumption and Lord Carnwath JJSC agreed and with whose reasons Lord Hope of Craighead DPSC also agreed) analysed what change, if any, to the previous law under the Companies Act 1985 the new provisions of the Act of 1986 had made. He said, at [37]:

> "The changes in form served, in my view, to underline that the "cash-flow" test is concerned, not simply with the petitioner's own presently-due debt, nor only with other presently-due debt owed by the company, but also with debts falling due from time to time in the reasonably near future. What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company's business.... The express reference to assets and liabilities is in my view a practical recognition that once the court has to move beyond the reasonably near future (the length of which depends, again, on all the circumstances) any attempt to apply a cash-flow test will become completely speculative, and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test. But it is still very far from an exact test, and the burden of proof must be on the party which asserts balance sheet insolvency."

162. Lord Walker referred to the judgments of Lord Neuberger MR and Toulson LJ in the same case and agreed that the assets and liabilities test should not be mechanically applied, but considered having regard to the nature of the company's business and its overall solvency. His Lordship preferred Toulson LJ's paraphrase of a commentary of Professor Sir Roy Goode, namely that what s.123(2) required was for:

> "…the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to be able to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due". [42]

163. In <u>Bucci v Carman</u> [2014] EWCA Civ 383; [2014] BCC 269, the Court of Appeal had to consider further the relationship between s.123(1)(e) and s.123(2) of the 1986 Act in a case where the trial judge had held that the company was not cash flow insolvent even though it was balance sheet insolvent, and so the statutory presumption that the company was unable to pay its debts had been rebutted. Lewison LJ, having analysed *Eurosail*, agreed that the cash flow test and the balance sheet test stand side by side and are parts of a single analysis of whether the company is able to pay its debts:

> "29. It is in my judgment clear from *Eurosail* and its approval of *Cheyne Finance* that the balance-sheet test in s. 123(2) is not excluded merely because a company is for the time being in fact paying its debts as they fall due. In the case of *Eurosail* that is clear from Lord Walker's approval at [42] of what Toulson LJ had said in the Court of Appeal, and his description of the two tests as standing side by side. In the case of *Cheyne Finance* it is clear from Briggs J's description of the balance-sheet test as an alternative test.

Thus I agree with Warren J at [34] that the two tests feature as part of a single exercise, namely to determine whether a company is unable to pay its debts. In addition, even when applying the cash-flow test it is not enough to merely ask ... whether the company is for the time being paying its debts as they fall due. As Briggs J said in *Cheyne Finance*, a realistic examination may reveal that a company is on any commercial view insolvent, even though it may continue to pay its debts for the time being."

164. It seems to me, therefore, that when determining the Company's ability to pay its debts at the time of and immediately following the Assignment, it is appropriate to ask first whether, at that time, the Company was in fact paying all its debts as they fell due, and if it was not, whether that was more than a temporary state of affairs that would soon be corrected or alternatively reflected its inability to do so, and then whether, in the reasonably near future, the Company would continue to be unable to pay its debts as they fell due. That will involve a consideration of the nature of the debts that the Company had and would have, and of the nature of its business. If, at the time of the Assignment, the Company was paying and would continue to be able to pay its debts as they fell due, it is necessary to consider, by reference to the Company's assets and liabilities, including prospective and contingent liabilities, whether it was paying debts on a commercially solvent basis or was doing so only by increasing its borrowing and inevitably storing up a state of insolvency in the longer term.

<u>The Company's history</u>

165. While the key date is 30 August 2017, it is necessary to consider the state of the Company's financial affairs at that time in a proper context, and so I shall review, as briefly as I can, the history of the Company and its finances from the time when it was owned by Serisys, and then focus more specifically on its financial position during the year 2017. In reviewing the facts, I bear in mind that further issues that I shall have to decide are, under s.238(5) of the 1986 Act, whether the Assignment was made for the purpose of the Company's business and could reasonably have been considered beneficial to it, and, for the wrongful trading claim, whether there was no reasonable prospect in August 2017 or October 2017 of the Company avoiding insolvent liquidation. I will therefore make factual findings that bear on those questions too. Sums expressed in dollars are US dollars, save where otherwise stated.

166. It is common ground that the Company was a non-trading research and development company within the Serisys group, initially a subsidiary of SSL and then, from about December 2014, a subsidiary of SGL. It nevertheless employed staff (unlike SGL) and rented offices. It therefore incurred tax, accounting, insurance, payroll and rental liabilities, among others. The Company had no revenue and was dependent on funding from Serisys or from SGL's shareholders and directors.

167. The accounts of the Company for the 15-month period ending on 31 December 2013 recorded a loss for that period of £365,084 (all running expenses), with £449,350 owing to SGL by that date, £13,026 of current liabilities and £89,438 in cash. The auditors' report states that the Company's funding is entirely dependent on continuing financial support of its parent, which had undertaken to support it until at least 31 May 2015.

168. Minutes of a board meeting of the Company on 12 June 2014 are revealing. They state that the Company is an R&D centre for, and wholly-owned subsidiary of, SSL, without

its own revenue, and wholly dependent on payments from its parent company or temporary funding from directors or third parties. Its status as a going concern was predicated on SSL meeting obligations from its operations as they became due. The minutes then go on to record that SSL had provided insufficient funds, and so the Company was unable to meet its current obligations. SSL was seeking further funding from an investor. A list of creditors and future debts before 1 July 2014 was included, and these included pension payments, auditors' fees, a director's loan, insurance premiums, HMRC, staff salaries and office rent. The directors expected liabilities to be paid by the end of the month as a result of the hoped for investment.

169. The auditors of the Company, A Mitra & Co, had noted on 2 June 2014 that the Company's directors should be mindful of wrongful trading. On 25 June 2014, Dr Rhodes emailed Mr Rowland saying that the Company should cease trading on 30 June 2014, having regard to the duties owed to its creditors. Mr Rowland thought that was premature, and (wrongly) that it needed the agreement of the SGL board, as it was the owner of the Company. At that time, the Company had borrowed £80,000 from Dr Rhodes and about £24,500 from his wife.

170. The expected investment did not come, but on 12 July 2014 the group was saved by an investment of £1.8 million by Barty Smith, who had advanced the Company £25,000 in about June 2014 (which remains outstanding). As a result, Mr Marsh and Mr Barty Smith's company became equal 35% shareholders in SSL, with HK Mo having the next largest holding, then Mr Rowland and various others, including Dr Rhodes.

171. This episode demonstrates the nature of the Company's finances from the outset. Substantial expenditure being incurred, a struggle to find the cash with which to pay debts, and further capital eventually being injected to keep the business afloat.

172. The group was reorganised in late 2014, following a US$3 million fundraising. New shares were allotted at a premium of $349 per share. The new investors (Mr Andrew Scott and Mr Hubbard) were given the right to appoint a board member. At the time, director loans to SSL totalled $3.24 million, of which $1.84 million could be converted into equity at the same premium.

173. Advice was taken on the restructuring of Serisys. In an email dated 14 November 2014, Mr Shovell told the directors that he considered that having a new holding company above a horizontal structure was a good (and indeed commercially necessary) idea:

> "Separating the IP and trades from each other's risk could be a life-saver if one aggressive future client goes hostile in an unforeseen contract dispute. They can only attack that one subsidiary, leaving sisters and parent risk-free."

There was a good strategic reason for having the IP owned by a non-trading subsidiary company.

174. Mr Porter was appointed a director of SGL in January 2015. He agreed to provide services through his service company, App Type Ltd., with a view to providing introductions to large organisations in the UK financial industry that might take a licence of Adypt. The first consultancy agreement was initially intended to be made with SGL, but this was either overtaken by or replaced with an agreement with the Company, signed

by Mr Porter on 20 May 2015, under which Mr Porter would be paid £800 per day for 11 days' work in 2015 or as might be agreed from time to time. Following that, Mr Porter subscribed for 334 ordinary shares in SGL at US$300 per share.

175. At a board meeting of SGL on 27 January 2015, it was noted that cash would last until early March 2015 and that $2.7 million of funding was required for the remainder of 2015. Mr Marsh agreed to build a book of expressions of interest to raise $2-3 million at the highest available price per share.

176. From this time onwards, the board of SGL consistently sought to raise money by the issue of new shares at a premium, and in so far as that did not work, by borrowing from connected individuals or (ideally) interested commercial parties.

177. The accounts of the Company for the year ending on 31 December 2014 recorded a loss of £587,718 for the year, and that the Company's current liabilities (now £126,621) exceeded its current assets (£16,075). SGL's undertaking to support the Company until at least 31 August 2016 was noted. Intra-company debt was £848,475. These accounts were considered by Dr Rhodes and Mr Rowland at a board meeting of the Company on 29 June 2015. They considered that, in view of the letter of support from SGL "and after some discussions, it was considered that the Parent company should be able to provide necessary support until revenue can be generated from the development work being undertaken".

178. By the end of 2015, SGL's hopes for further funding were focused on a possible $3 million investment from Chepstow Capital, a Hong Kong based private equity fund. An offer of an investment of a lesser sum was rejected by SGL's board and its executive directors were requested to make further efforts to obtain alternative funding.

179. At a board meeting of SGL on 22 January 2016, it was confirmed that Chepstow Capital would invest US$3 million, but only once LCH and one Chinese broker had signed up to take licences of Adypt. It was reported that Surecomp International Ltd ("Surecomp"), who had previously been considered a likely equity investor, was "considering an investment at US$420 per share". Following a 6-month cashflow forecast dated 15 January 2016, an urgent need for 30 days' cashflow amounting to $479,000 was identified. This would enable SGL to reach the end of February 2016 with a (just) positive cash balance, rather than a negative balance of -$599,222. A rights issue was ruled out. A 90-day term loan of US$500,000 at 1% interest per 30 days was resolved to be offered urgently by the directors to interested parties.

180. On 26 January 2016, the SGL board decided that an investment from Surecomp over the offer from Chepstow Capital would be preferable, and it was agreed that it was important to develop a "Plan B", against the possibility that all financing alternatives failed. Surecomp took a 4.3% equity interest in SGL.

181. On 5 April 2016, US$1 million was raised by a rights issue.

182. In June 2016, when the 31 December 2015 year end accounts were signed, it was recorded that the accumulated losses of the Company were nearly £1.66 million, funded by debt from group companies. Current liabilities were £23,780 at year end, with cash of £9,063. SGL still undertook to support the Company in future.

183. On 20 June 2016, Ms Ball signed a loan and security agreement ("LSA 2016") with SGL. The loan was $500,000 for 3 months, at 1% per month. At this point, Mr Marsh and Mr Rowland were hoping that BOCI was about to agree, in principle, to purchase a development licence, and Mr Rowland considered that a further rights issue would be required, raising US$2 million. In the meantime, Ms Ball's loan was said to be "the only way we have found to make our June payroll". LSA 2016 required SGL to offer a continuing security interest in the "Intellectual Property Collateral", as defined in an Intellectual Property Security Agreement ("IPSA 2016") of the same date. Ms Ball's loan has remained outstanding.

184. In August and September 2016 respectively, Ms Sun and Mr Harrison, both of whom Mr Marsh had met and had interested in Serisys, subscribed for shares in SGL at US$300 per share, raising some US$200,000.

185. By November 2016, the agreement with BOCI that Mr Marsh thought was imminent had been stalled by BOCI. BOCI's central purchasing committee required Serisys to re-tender in an open competitive process, whereas Mr Marsh had been hoping that his contact, Gary Ma, would be able to see Adypt taken up without any detailed assessment by his seniors at the bank. Typically, Mr Marsh thought that this would not present a long-term problem because "Louis, the Deputy CIO, is managing the process. He and HK [Mo] have been friends for 30+ years and they meet regularly. Louis has told HK that he is confident of success now that the Gary 'bypass' is in place." Other directors of SGL thought differently, and Mr Marsh was forced to agree that it should plan for the worst, while hoping for the best.

186. On 23 December 2016, following a "non-decision" by BOCI, Mr Marsh told his fellow directors that SGL would not be able to pay the payroll at the end of the month. On 29 December 2016, Mr Marsh told them that a group of shareholders including him would purchase warrants to a value of US$250,000 with an exercise price of US$300, to enable the company to make payroll.

187. The management accounts for the year end showed that SGL had made a loss of $6.3 million in 2016. The Company's own financial statements for the year ended 31 December 2016 recorded a loss of £781,751. Current liabilities were £87,888 and current assets (including cash) only £7,258. Group companies (principally SSL) were owed about $2.35 million. Total staff costs were running at about US$700,000 a year.

188. By early 2017, SGL's hopes for a valuable licence were pinned on the projected merger of the London Stock Exchange and Deutsche Börse ("DB"). Mr Harrison and Ms Sun formally became non-executive directors of SGL. By March 2017, it was known that the LSEG/DB merger would not be proceeding, and Mr Marsh's interest then turned to the possibility of either of the exchanges independently being interested in Adypt. Mr Porter and Mr Marsh were those principally trying to make that happen, using contacts within LSEG and at DB.

189. At the same time as hoping for licence agreements with LSEG, DB or BOCI, there was also hope that someone would be willing to make a substantial investment in SGL, including in particular NordEng, a Chinese investment company.

190. The trouble was, however, that those willing to inject substantial funds in principle wanted to see a commercial licence being signed first, and of the larger exchanges and

banks looking at Adypt, none of them wanted to risk being the first organisation to proceed with it. This was the case with NordEng, who told Serisys in January 2017 that they should come back for further discussion when a licence to BOCI was resulting in substantial revenue growth. BOCI had indicated by March 2017 that they were not willing to become the first Adypt licensee, and Serisys was now focusing on the possibility of a deal with Bualuang in Thailand.

191. As a result of this dilemma, any hoped for (and in Mr Marsh's case, expected) progress with selling licenses or raising investment gradually subsided, in late 2017 and early 2018, until by September 2018 the directors of SGL were willing to sell Adypt for what they could reasonably get. But for Mr Marsh, and Mr Rowland to a lesser extent, the threshold of a first licence was always just around the corner.

The Company's and SGL's finances in 2017

192. It is in this context that it is necessary to consider in more detail the state of the Company's and SGL's finances through 2017. Although the ultimate inquiry is about the solvency of the Company, the Company was entirely funded by or through SGL, so its prospects of paying its creditors depended on SGL's prospects of having any spare cash to provide to the Company for that purpose or other purposes.

193. SGL's monthly cash flow forecasts, prepared by Mr Rowland and described in his evidence as being "communication documents", were examined in some detail in cross-examination. These contained projections for incoming funds, in the form of equity investment and Adypt licence fees. Very substantial monthly income from licence fees were included, often projected to start only 2-3 months from the date of the forecast. These were hopelessly optimistic, in that it was accepted by Mr Harrison and ultimately not seriously disputed by any Defendant, that it would take between 6 and 12 months, sometimes longer, to negotiate and bring into effect a licence with the kind of higher level banking or trading entities that Mr Marsh was pursuing, so as to produce significant income at the levels projected by Mr Rowland.

194. The Company continued throughout 2017 to incur further liabilities, including paying its employees and their pension contributions, paying PAYE income tax and employer's NI contributions, and paying rent for its offices. It is apparent from cash flow projections that the costs associated with the Watford business averaged at a little under $90,000 per month. However, by March 2017 significant debts of the Company of about $110,000 had built up, according to SGL's April 2017 cash flow forecast, because only $56,961 out of projected $167,261 expenditure for March 2017 was incurred. Moreover, there was a substantial shortfall of income in that month, owing to an issue of shares and warrants raising less than half of the previously projected $500,000.

195. The April 2017 cash flow forecast depended, for its positive cash balance of nearly $1 million in December 2017, on a projected $3 million from a further issue of shares and warrants in May 2017 ($1.25 million of which would be used to repay loans), $870,000 of income from Adypt being licensed to LSEG in August 2017, and $1.2 million of Adypt income from Hua Tai and China Merchants in November 2017. SGL's strategy was to continue to raise quite large sums from shareholders in the short term, to enable it to repay non-group loans and to tide it over until the revenue stream from Adypt started to flow. The running expenses of the Company were projected at about $110,000 for April

and about $137,000 for May, thereafter reverting to the regular monthly amount of about $90,000.

196. At the SGL board meeting on 18 April 2017 (which was the first meeting that Mr Harrison and Ms Sun attended), discussions with LSEG and DB separately were reported by Mr Marsh, and some leads for potential investment additional to NordEng were mentioned by Mr Rowland. Nothing specific is recorded in the minutes about a new rights issue, or the income projections in the cash flow forecast. Ms Sun reported to Mr Marsh and Mr Rowland by email on the same day that NordEng preferred investment in more mature businesses that were at least breaking even but preferably were making £1 million of profits, and that they were still interested in a future investment, but not at the current time. This was confirmed in a further email from Ms Sun on 26 May 2017.

197. Management accounts of SGL as at 30 April 2017 showed that the Company had current liabilities of $384,363 and less than $20,000 of cash, and Serisys as a whole had current liabilities of $3,980,205.

198. On 8 May 2017, $210,000 of new capital was raised by an allotment of 700 new shares at $300 each to Serenity Sea Ltd, a Marshall Islands trust company controlled by Ms Ball.

199. As at 30 May 2017, the management accounts showed Company current liabilities at $377,857 and somewhat reduced group current liabilities. As at 30 June 2017, Company current liabilities had reached $415,250, with only $13,207 in cash. Group liabilities were $3,126,094, with less than $40,000 in cash.

200. The minutes of the 20 June 2017 board meeting of SGL record that Mr Marsh updated the board on LSEG and DB, saying that each wanted to partner with Serisys and each was aware of the other's intentions. There was nothing, however, to support a conclusion that any revenue generating licence with either business was close, or even probable. The minutes contain nothing about how SGL would attempt to finance the continuation of its business, given that, by this time, the $3 million of new equity investment had not materialised, only $210,000, and that the prospect of $870,000 Adypt licence income from LSEG in August 2017 was fanciful. These two items had underpinned the positive cash flow in April 2017.

201. On 25 June 2017, SGL wrote to the Company's directors stating that it would provide financial support and meet all the Company's obligations without reservation until at least 31 August 2018. The week after that, a business known as SFM offered a 5-month loan of $324,000 but on onerous terms, including its debt having preferential status and at higher interest rates (2% per month), together with 32,400 share warrants at $300 per share. This was unattractive to Mr Marsh, and instead he persuaded directors, in particular Ms Sun, to offer shares to investors at $300. For this purpose, a marketing pack had been prepared, containing a cash flow forecast. Which version this was is unclear – possibly the April 2017 version. On 4 July 2017, Mr Harrison questioned Mr Marsh by email about it, commenting that it looked "a bit optimistic", and questioning whether it was current.

202. On 10 July 2017, Mr Marsh emailed Mr Rowland and Ms Sun, observing that Serisys did not yet have its first Adypt customer, and exhorting them to focus their effort on securing the $600,000 that was needed by SGL to give him time to "close the first

customer". On the basis of the cash flow forecasts, that was the money that was needed for the next 3-4 months. It did not arrive.

203. The next cash flow forecast was prepared on 18 July 2017, showing the actual cash flow for June 2017 and making forecasts for the rest of the calendar year. This showed a positive Serisys cash balance of $41,961 at the end of June, but with only $56,927 of the Company's expected outgoings of $90,739 and only $199,254 of SSL's projected outgoings of $293,662 having been paid. Serisys was staying afloat by SSL and the Company not paying their outstanding debts.

204. No doubt as a consequence of several months of underpayment of the Company's expenses, the projected outgoings for September 2017 were stated to be almost double the usual monthly figure, at $171,716. The investment of $3 million previously projected for May 2017, which did not materialise, was now shown as investment in shares and warrants of $400,000 in July, $300,000 in August and $3 million in September. Substantial Adypt income was projected for November 2017 – the same $870,000 previously expected to come from LSEG. Without the investment projected for July, August and September 2017, SGL would have had a very significantly negative cash balance for each of those months.

205. On 19 July 2017, Mr Marsh emailed Gary Ma at BOCI attaching a draft Adypt licence and a draft press release announcing that SSL had licensed Adypt to BOCI. Mr Ma was Mr Marsh's friendly contact at BOCI and was its Chief Information Officer. The licence was to be for a term of 5 years, for development and use, in consideration of US$1 per year. This was obviously intended by Mr Marsh to be a loss leader for Serisys, to get across the funding threshold of the likes of NordEng and to encourage other banks to take up licences. But no licence was agreed, even one that would cost BOCI $5 for 5 years' development and use.

206. The 31 July 2017 management accounts showed that Serisys's loss to date for 2017 was US$2.46 million and group current liabilities were $3.11 million. The Company was shown as having cash of $11,506 and current liabilities of $454,263.

207. On 14 August 2017, Mr Marsh emailed Mr Harrison, telling him about the shareholders' excitement that McKinsey's "Utilities" model for outsourcing Adypt-based transaction settlement to LSEG/DB was of interest to Credit Suisse. While Mr Harrison thought that was good news, he commented that persuading individuals to invest in SGL was unlikely to be enough:

> "In truth the scale of funding that Serisys needs requires heavy hitter / family office sort of money."

208. Shortly after that, the pack of documents for directors for the 22 August 2017 board meeting was sent out. The "Funding, Legal and Marketing" paper prepared by Mr Rowland identified the funding opportunities at that time as being DB and Nord Engine. Mr Marsh's Europe pack however showed that he was focused on the possibility of an outsourcing model of transactions by Credit Suisse and other banks to LSEG <u>and</u> DB, which was a more ambitious project than either of LSEG or DB deciding to take a licence for their own operations.

209. The August 2017 cash flow included in the pack shows that the $400,000 of equity investment projected for July 2017 had not materialised. Instead, $200,000 was now projected for August 2017 and $3 million for September 2017, with substantial income from Adypt licensing starting in October 2017. It also shows that the London, Thailand and Hong Kong offices had underpaid their regular expenses by almost half in July 2017.

210. As a result, the projected outgoings for the Company in September 2017 was the remarkable sum of $564,307, in place of the usual $90,000 per month. The position of accumulated arrears needing to be met is replicated in the cash flow for each of SSL and SSTL. Without the projected $200,000 investment in August 2017, the group's cash flow would be negative by over $100,000 at the end of that month, and without the projected $3 million in September 2017 it would be negative by over $1.8 million, if the projected payments of outstanding debts of the Company, SSL and SSTL were made. Put another way, none of the Serisys companies could pay their accrued liabilities in September 2017 unless by then very substantial investment far in excess of the level regularly raised from shareholders was obtained by SGL.

211. Ms Sun picked up from the cash flow forecast that revenue from AMTD, a Hong Kong wealth manager and broker, was shown for the first time, and queried that. Mr Rowland replied that AMTD was going very well and Serisys's inside contact was being useful, and a demonstration of Decide and Adypt was arranged for AMTD for 28 August 2017.

212. On 21 August 2017, HMRC contacted the Company's accountants, enquiring about £108,442.19 of unpaid NICs and PAYE. Jenny Mitra of Mitra & Co warned Mr Wong in Hong Kong that HMRC would probably attend the Watford offices to chase up payment.

213. On 22 August 2017, the board meeting took place at 3pm Hong Kong time. 14 minutes after the start of the online board meeting, Greg Allen of LSEG emailed Mr Marsh and Mr Porter in response to a chaser that Mr Marsh had sent him in July 2017 for feedback on a presentation to LSEG in May 2017. Mr Allen said:

> "Our feedback is that we find your technology novel and intriguing and would like to investigate it further. However, this is not high priority for us and we have no current projects or timelines that this is an immediate candidate for. We intend to digest further as time allows and if you are willing, such that we have a good basis of understanding and can identify an opportunity should one arise."

214. This email was clearly, despite the positive spin that Mr Marsh sought to put on it, a "very interesting, but no thank you" reaction to the demonstration of Adypt, or as Mr Riley KC characterised it, "don't contact us, we'll contact you". Significantly, it meant that the already overly optimistic projection of $890,000 of income in November 2017 from LSEG for an Adypt licence had to be removed from the cash flow. But neither Mr Porter (who saw Mr Allen's email immediately) nor Mr Marsh (who says that he did not) drew it to the attention of the board at the meeting. Nor did they do so for some weeks (Mr Marsh belatedly forwarded it to other board members on 8 November 2017).

215. Instead of considering the impact on cash flow, the board (according to the minutes) made no resolution about funding except to empower the company secretary to allot SGL shares already authorised to be allotted but not yet subscribed. Nothing was done or said in relation to the projected investment income of $200,000 in August and $3,000,000 in September 2017.

216. Instead of acknowledging the damage that the LSEG withdrawal did, Mr Marsh wrote to two principal and wealthy shareholders, Mr Scott and Mr Hubbard, on 24 August 2017:

> "We now know why Deutsche Boerse and London Stock Exchange Group (LSEG) are interested in ADYPT CLOUD (see attached).
>
> Please express your continued support for our company by subscribing to your proportion of our current share issue, namely 1,000 shares each.
>
> These represent good value for money at US$300 per share.
>
> This will allow us to focus on closing a deal with Deutsche Boerse or LSEG."

In light of Mr Allen's email of 22 August 2017, this was dishonest of Mr Marsh. The attached document was a paper explaining the proposed "Utilities" model for Adypt.

217. Mr Marsh approached Ms Sun to make a modest loan to tide SGL over. She wisely asked first to see a list of outstanding loans. She also asked: "Even if AMTD signed in September, there is still a continuing funding shortfall. What is the plan for the shortfalls that may be occurring for coming months?", to which Mr Rowland replied: "We will continue with your help to sell shares @ 300/share, assisted by an AMTD signature".

218. The list of lenders supplied by Mr Rowland showed that Ms Ball had advanced Serisys an aggregate amount equivalent to US$1.404 million. The first loan was HK$700,000 in May 2016, then the $500,000 loan in June 2016, HK$1.2 million in November 2016, and further sums on an almost monthly basis until June 2017, when she advanced HK$1.529 million in 3 tranches. She then made 5 separate loans in July 2017 (three in sterling) amounting to a little over HK$2 million in aggregate, and a further loan of a little over HK$205,000 in August 2017. All these, except for the $500,000 loan, were lent to SSL. Mr Rowland was recorded as having lent a total amount equivalent to $546,632, including over HK$3 million in January 2017 and HK$387,500 in May 2017.

219. It appears, therefore, that SGL was being bailed out by Ms Ball and Mr Rowland when it otherwise could not raise money to pay debts, as required.

220. Ms Sun was not deterred by the outstanding loans and arranged for her trust, Tom-Sun Trust, to lend SSL US$100,000 on 31 August 2017 for a term of 3 months.

221. Even so, the net cash flow for August 2017 was only about US$22,400 better than forecast, which was mainly due to underpayment of London and Hong Kong operating expenditure during that month. The management accounts as at 31 August 2017 showed that the Company's current liabilities had increased to $481,201, with only $17,239 of cash.

222. In the September 2017 cash flow forecast, another $350,000 of sales of shares and warrants by SGL was projected, and expenditure by the Company of only $60,298 for September, with $284,612 projected for October 2017. This and other expenditure was projected to be funded by a further $3 million of sales of shares and warrants. Income from Adypt licensing prospects was forecast to start in October 2017, with $900,000 from LSEG or DB in November 2017.

223. On 20 September 2017, Mr Marsh wrote to shareholders of SGL stating that Serisys was on a shortlist of two to provide Adypt and Decide to a Hong Kong prospect, and that "[DB] and [LSEG] want to partner with us as they establish securities processing utilities in Europe". He explained that as a result it was expected that the share price would rise, however 2,000 shares at $300 per share were on offer. This was again dishonest of Mr Marsh, in the absence of some indication of change of position from LSEG.

224. On 28 September 2017, Mr Marsh told Mr Hubbard and Mr Scott that he had been told informally that AMTD had been secured, that a Mr Koschitzky was investing US$100,000, and he invited each of them to match that investment.

225. Management accounts to the end of September 2017 showed that the Company's current liabilities had now grown to $571,705 with negligible current assets. This was an increase of $90,000 in one month, meaning that none of the regular September expenses of the Company had been paid, including the salaries of the Company's staff, which made up the major part of its monthly expenses. It also meant that at the end of August 2017 the Company had no money with which to pay its outstanding debts of $481,201. SSL had nearly US$2.4 million of current liabilities and about $594,000 of current assets, so any modest funds that SGL could raise could not all go to the Company, as Ms Sun's loan to SSL demonstrates.

226. On 17 October 2017, the board of SGL recorded that its directors continued to pursue sources of funding vigorously. Contingency plans were noted, against the risk that funding was not realised soon. If necessary, the Watford and Hong Kong offices would be closed. The October cash flow forecast included equity investment of $350,000 in October and £3 million in November 2017. Much more limited income from Adypt was included from November 2017. Without the investments, SGL's cash flow would be substantially negative for both months, and thereafter. The cash flow records that $17,717 of the Company's debts had been paid in September 2017, and that a payment of $316,647 was required in November.

227. On 25 October 2017, HM Revenue and Customs ("HMRC") wrote to the Company requiring immediate payment of a tax liability of £131,548.80, failing which a winding up petition would be presented. This sum included interest on late payments of PAYE and NICs for December 2016, January 2017 and February 2017, and then unpaid PAYE and NICs for each month from April 2017 to September 2017. From the amounts claimed by HMRC, it is apparent that no or virtually no payments were made by the Company during these months. The Company had been unable to pay its tax liability for most of 2017.

228. Mitra & Co, who forwarded the demand to Mr Wong and Mr Rowland, noted that it appeared that no action had been taken following their e-mail of 21 August 2017. Mr Rowland forwarded the demand to board members on 29 October 2017. Mr Harrison

enquired if there were funds to pay at least some of the tax, to which Mr Marsh replied "Pamela [Ball] can pay but expects other shareholders to contribute".

229. On 31 October 2017, Mr Rowland emailed the board of SGL stating that the Watford rent of £4,156 was due on 1 November and that "we have insufficient funds for this payment and will advise the seven [staff] today".

230. The Company obtained an extension of time to 10 November 2017 to pay the tax and an extension to 9 November 2017 to pay the rent.

231. In the management accounts to the end of October 2017, the current liabilities of the Company had reduced to $309,437, though the categories of liabilities do not include sums sufficient to cover the amount of tax payable to HMRC, so that figure cannot be accurate. The current assets are negligible.

232. On 2 November 2017, Mr Harrison told Mr Ian Arthur [a shareholder] that Serisys was rapidly running out of money and a lot of people were not being paid. On 3 November 2017, Mr Harrison met Mr Hubbard and told him that there was a suspicion that Watford staff had not been paid and that there was no sales process with DB or LSEG. Mr Hubbard warned of the possible consequences of not paying the staff. He asked Mr Rowland for an aged creditor report, which was provided to him on 6 November 2017. The report was not considered during the course of the oral evidence, because it was embedded as a link in an email within the trial bundle, which is assumed now to be unavailable. However a document disclosed by the THDs was also an aged creditors list in Excel format, created by Mr Wong on and dated 6 November 2017, so this is highly likely, in my judgment, to be the document that was provided to Mr Hubbard on 6 November 2017. Having read it, Mr Hubbard emailed Mr Rowland: "Thank you Nick – horrifying reading – will consult with Andrew Scott re response".

233. The aged creditors report reveals that, in US dollar equivalents, over $115,989 of Hong Kong expenditure dating back to the end of May 2017 was more than 30 days overdue, $230,908 of Watford expenses dating back to April 2017 was more than 30 days overdue, $107,739 of Hong Kong expenditure was up to 30 days overdue and $87,419 of Watford expenditure was up to 30 days overdue, with other liabilities of $12,495 being current for Hong Kong and $37,079 for Watford. About $140,000 of liabilities in Thailand from June 2017 were overdue. Total unpaid liabilities of the Company, SSL and STCL to unconnected persons were $760,357.

234. Later that day, having been refused sight of the October 2017 board minutes even though he was a director of SGL, Mr Hubbard asked Mr Marsh to call a board meeting:

> "Matters which need considering are: have we a going concern or is the company trading while insolvent. Please prepare aged creditors list, what likely prospects you have of closing any sales of equity or product, and the current state of negotiation you have with those parties."

235. Mr Hubbard resigned from the board when no meeting was called, blaming the refusal to provide company documents. In an email dated 8 November 2017, he told Mr Marsh:

> "I also had your assurances that Pamela was funding the company. The aged creditors tell a different story."

This email and the aged creditors report clearly demonstrate that there were extensive liabilities that were due that were not being covered by loans to SGL or otherwise funded. In particular, the Company had simply stopped paying monthly PAYE and NI contributions that were due to HMRC, pension contributions and, as from the end of August 2017, staff wages.

236. The November 2017 cash flow forecast records that only $21,810 of the projected October expenses of the Company were paid, and that $126,547 would be paid in November 2017 and $352,500 in December 2017. This, and similarly increased payments for SSL, were intended to be funded by $500,000 of share and warrant sales in November and $3 million of share and warrant sales in December 2017. Only $99,900 of previously projected equity sales of $350,000 for October 2017 were achieved.

237. On 22 November 2017, Mr Marsh emailed shareholders painting a rosy picture of the Adypt product, its potential and the prospects of income. AMTD was said to be in the final stages of selecting Serisys, and BOCI to be negotiating an Adypt evaluation licence. He offered a rights issue at a discounted price of US$200 per share, open for take up until 27 November 2017. By 25 November 2017, the board was informed that the response had been poor, with only 0.6% take up, and it then resolved to change the terms, offering shares at $50 per share. Mr Shovell called for Mr Marsh's resignation.

238. There was, as a result of this rights issue, a take up of 9,836 shares, raising $491,800 in December 2017. Management accounts for the end of November 2017 recorded a loss for the year to date of $3,879,000 and current liabilities of $1.78 million for SSL, $333,626 for SSTL and $306,650 for the Company. Thus, although the best rights issue that SGL could manage raised more money than the amount of the Company's outstanding unconnected debts, the money could not be solely applied to the Company. Some small part probably was, in that the December 2017 management accounts record its current liabilities at $274,863, but what was projected in the November 2017 cash flow forecast as required to be paid in November and December ($126,547 and $352,500 respectively) was not paid.

239. Although SGL consistently failed to achieve the investment and income projections in its cash flow forecasts, as a group it did manage to stay in positive cash flow at the end of each month according to the figures in Mr Rowland's spreadsheets. At the end of June 2017, the ending cash balance was said to be $41,961; at the end of July 2017 $74,607; at the end of August 2017 $104,982 (a little more than Ms Sun's loan); at the end of September 2017 $64,337, and at the end of October 2017 $33,104. If correct, these show that, by the end of each month, SGL had some cash available. However, at the end of October 2017, Mr Rowland told the board that SGL did not have the money with which to pay £4,137 of rent, which suggests that it did not have $33,104 in cash, or at least that money could not be spared for the Company's debts.

240. In any event, it is clear from contemporaneous documents, the contents of the cash flow forecasts themselves and the aged creditor report that the only way that SGL managed (if it did) to stay cash flow positive was by failing to pay very substantial liabilities at the time when they fell due for payment, such as the Company's tax and NI liabilities. This is reflected too in the monthly management accounts, where the amount of current

liabilities of the Company increased from $384,363 at the end of April 2017 to $481,201 at the end of August 2017 and then US$571,705 at the end of September 2017, indicating (consistently with the aged creditors report) that expenses were probably not paid in September 2017.

Was the Company unable to pay its debts on 30 August 2017?

241. Against this review of the nature of the Company's business and its funding over an extended period, I must consider whether as at the date of the Assignment, 30 August 2017, it was able to pay its debts. As SAHL was a connected person, it is presumed that, for the purposes of the TUV and TDC claims, the Company was unable to pay its debts at the date of the Assignment. The burden is on the THDs to prove the contrary.

242. The starting point must be that the Company was not paying its debts as they fell due at that time. It had not been doing so since at least April 2017 and possibly earlier (reflected by the HMRC interest charges for late payment from December 2016 to March 2017). The Company's business was limited to paying six (later seven) staff to conduct full-time development work in its Watford offices. Its debts were those associated with running and paying for those offices and paying its staff, with consequential liabilities for tax, NI, pensions, accountancy, payroll services and insurance. On the critical date, the Company was not meeting its tax, NIC or pensions liabilities as they fell due. It ceased to pay its staff in the following month.

243. The inability to pay was not a minor blip that would be soon remedied. In the event, SGL did find the money to lend to the Company to pay arrears of tax and NICs up to and including 5 July 2017, to avert a winding up petition, and it did pay the rent late, but it continued to fail to pay its staff (at times) and tax and NICs thereafter. When the winding up petition was eventually presented on 6 February 2019, the petition debt included all NICs from August to November 2017 inclusive, January 2018 and part of May 2018, and interest for late payment on all monthly instalments except December 2017; it also included full PAYE amounts for August to November 2017 inclusive, and January 2018 to November 2018 inclusive, together with late payment interest and penalties. Apart from December 2017 (which was presumably paid out of the proceeds of the November 2017 rights issue: see [238] above), the Company had not paid the PAYE on salaries from the period ending on 5 August 2017.

244. Mr Marsh and Mr Rowland did not say that they decided not to pay HMRC even though the Company could have done so. The reality was that SGL as a group could only get by and stay afloat for as long as it did by "robbing Peter to pay Paul", and by not paying some of Paul's debts at all. The Company paid as little as it could get away with. As Mr Hubbard divined in November 2017, SGL was not being funded and was insolvent. SGL could not afford to allow any of the regional companies to collapse: it needed the contributions to income (Thailand), marketing and Adypt development (Hong Kong) and Adypt development (Watford) that each provided. The funds that it raised from time to time had to be applied to the most urgent debts of all three companies, including the repayment of loans and the settlement of employee disputes.

245. I therefore conclude that the failure by the Company to pay its debts as they fell due reflected an inability to do so. The Company could not do so unless SGL provided it with the necessary funds, and SGL was unable to do so because it was not receiving enough income or capital to fund all three companies. For a while, SGL was able to

continue to fund its subsidiaries by borrowing from its directors or shareholders or their associates, and by selling shares or conducting rights issues. But the problematic November 2017 rights issue showed that that means of funding had all but dried up, if the existing shareholders were not to dilute their equity by offering discounts.

246. The THDs' argument to the contrary was based on the Serisys group managing to have a positive cash balance at the end of each month, according to Mr Rowland's cash flow forecasts, and SGL's *modus operandi* being to raise money as and when it needed it, by loans and rights issues, so that it was never out of funds. However, the positive cash balance was achieved (on Mr Rowland's forecasts) by not paying debts. The management accounts show that there was always a large deficit of current liabilities over assets and insufficient cash. The willingness of shareholders to continue to invest was bound to be exhausted at some point. It is fair to note that the November 2017 issue did raise about $500,000, and that in 2018 three individual shareholders then invested a further $167,560 in a rights issue in March, and those and two other shareholders invested again in the Autumn of 2018, again raising over $500,000 in total. However, these investments, though substantial in their own right, were far below what was needed to pay the three companies' debts and fund ongoing monthly expenditure.

247. As from 30 August 2017, the Company would continue to be unable to pay its debts as they fell due unless something material changed, namely an income stream from a very valuable licence or a substantial investment of millions of dollars, as Mr Harrison had recognised in mid-August 2017 was needed (see [207] above). However, there was no prospect of this happening in the reasonably near future. It was likely to take 6-12 months to derive an income stream from a valuable licence agreement, and investment on a substantial scale would not happen until there was a licence in place. This timescale was confirmed by Mr Harrison and by Mr Porter's instructions to Mr Robertson, the JPPDs' expert witness, which said that it would take 12-18 months for someone like Serisys to conclude an IT agreement with a large bank. The Company's debts, in the meantime, would continue to build up month by month, at a reasonably predictable rate of about $90,000 per month.

248. From summer 2017 onwards, despite Mr Marsh's optimism, money that would make everything come good was not just around the corner. Relatively small amounts were raised by applying pressure to individual shareholders, Ms Sun in August 2017, who lent SSL $100,000, Mr Dickson in September 2017, who bought 100 shares at $300 each, and then the mismanaged November 2017 rights issue, which resulted in $491,800 being raised in December 2017, by rather desperately cutting the share price from $300 to $200 and then to $50. But that was not enough to pay all the Company's debts, as the detail of unpaid HMRC debt from 5 August 2017 demonstrates. In September 2017, the Company was unable to meet any of its running expenses at they fell due. At the end of October 2017, SGL did not even have £4,137 with which to pay the Company's monthly rent.

249. The Company was therefore, in my judgment, unable to pay its debts as they fell due from around June 2017, as the increase in net current liabilities over the period April to August 2017 shows. Although, when necessary to do so, SGL funded the Company to pay the HMRC arrears up to and including 5 July 2017, it could not continue to fund all the Company's expenditure and all SSL's expenditure. The best evidence of that is the fact that it did not do so. Shortly after the relevant date, it ceased to fund payment of the Company's staff and had by then been taken to a Labour Tribunal in Hong Kong for failing to pay its staff there.

250. The fact that Mr Rowland's cash flow forecasts show SGL remaining cash flow positive at the end of each month until March 2019 proves nothing. First, the THDs accepted that the Company was unable to pay its debts by October 2018 – and yet SGL's overall cash flow was positive at that time, according to the cash flow forecasts. Second, if it did do so, SGL maintained a positive cash flow balance by not paying its debts, or by paying them late, when it did from time to time manage to raise relatively small sums. But what the Company was unable to do was pay its debts as they fell due.

251. In so far as it is necessary to consider whether the Company's liabilities, including prospective and contingent liabilities, exceeded the value of its assets, the position is clear. This was not a case of a company that had substantial capital assets but was nevertheless experiencing cash flow difficulties. On 30 August 2017, the Company disposed of its only valuable asset. The one-year user licence it was granted in return was of no real value, if any value at all. The Company still had its staff and its office, but they had to be paid for at market rates. In any event, the Company was not able to exploit those assets because they worked full-time on behalf of SAHL, borrowing from SGL money with which to pay the staff, when money was available.

252. The Company's liabilities, however, were destined to grow and the Company had no assets. Even excepting the intra-group debt, there were accrued unpaid liabilities of $481,201at the end of August 2017, and unfunded prospective liabilities going forwards at the rate of about $90,000 per month. Apart from a little cash in hand at the date of the Assignment, the Company had no assets of value. The undertaking that SGL had given to fund the Company was not being complied with and was of no real value, as SGL would only act in its own interest.

253. Accordingly, the Company was also balance sheet insolvent as a result of the Assignment.

254. The Assignment was therefore a TUV within the meaning of s.238 of the 1986 Act.

<u>Are the directors relieved from liability under s.238(5)?</u>

255. Where there is a TUV, the court is required to make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into the transaction in question (s.238(3)). However, the court must not make such an order if it is satisfied of the matters specified in s.238(5). For convenience, I set these out again below:

> "(a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and
> (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company."

256. The law in this regard has recently been reviewed by the Court of Appeal in <u>TAQA Bratani Ltd v Fujairah Oil and Gas UK LLC</u> [2025] EWCA Civ 1669. The main issue in that case was the correct identification of the transaction. The trial judge had held that the defence in s.238(5) was established. The main consideration was the second, objective, limb of the test. Falk LJ commented (at [57]) that the surrounding circumstances of the transaction also need to be taken into account, as "it is very difficult to see how, taken in isolation, a transaction at an undervalue could ever reasonably be

believed to benefit an insolvent company". The relevant question is therefore whether, considering all the relevant circumstances, there were in fact reasonable grounds for the belief." That is a question to be answered from the perspective of the company:

> "That is the correct, and only, lens through which the transaction must be viewed. This reflects the fundamental principle that, as a separate legal entity with its own creditors, the company's interests must be considered separately from that of other members of the group: see the discussion of *Walker v Wimborne* [1976] HCA 7, (1976) 137 CLR 1 in *Sequana* [2022] UKSC 25, [2024] AC 211 at [29] and [389])."

257. In this case, both limbs of s.238(5) are very much in play. GHSL contends that the Assignment was made dishonestly, not in good faith, in order to seek to protect the IP assets from the reach of creditors, at a time when the Company was insolvent. I will address that submission later, when addressing the question of whether the Assignment was a TDC and a breach of the directors' duties of good faith.

258. Limb (a) also requires the transaction to be for the purpose of carrying on the company's business. I have addressed the nature of the Company's business above. Its only business was to carry on the development of its main asset, the Adypt software, funded by monies borrowed from SGL. All the software that it owned (or had rights over) was transferred by the Assignment to SAHL. Its business therefore changed. It was no longer developing an asset that it could realise for its own benefit, by sale or licensing. Its business was providing services to others. It therefore lost its business asset but, with the continued support of SGL, its staff could continue to do the same work.

259. It is hard to see how the Assignment was for the purpose of carrying on the Company's business. The question falls to be considered in the context of a company that is unable to pay its debts and where the creditors' interests must be taken into account. Accordingly, the transaction must have been done for the purpose of enabling the company to keep its business going, for the benefit of its creditors. If Mr Marsh and Mr Rowland are to be believed, it was instead for the purpose of enabling SSL, and perhaps SSEL, to carry on their businesses of licensing the software (since it could not have been intended that SAHL would be the licensor). If, on the other hand, GHSL's allegation is substantiated and the Assignment was to protect the IP against potential claims of creditors, then necessarily the transaction was not made in good faith for the purpose of carrying on its business.

260. Faced with this difficulty, Mr Smith invited me to find that Mr Marsh and Mr Rowland believed that the only way to promote the success of the Company was for other companies in the group to sell licences, that this had reasonable prospects of success, and that SGL would continue to fund the Company. He submitted that the only realistic way for the Company to flourish was for SGL to continue funding it (which is correct) and that for SGL to do that it needed to be able to sell licences, which would provide income and attract more investment.

261. That is no doubt true, as far as it goes, but Mr Marsh and Mr Rowland never considered how best to promote the success of the Company. It was the success of Serisys as a group that they were concerned with. The Assignment was the result of a decision by Mr Marsh and Mr Rowland to facilitate the carrying on of Serisys's business as a whole, for the benefit of SGL's shareholders, not carrying on the Company's business separately. The

Company was a means to an end, if the true objective of the transaction was the intended licensing of Adypt by SSL and SSEL. The purpose of the Assignment, as Mr Marsh and Mr Rowland explained it, was to promote the interests of SGL, as owner of SSL and SSEL, and the Company was required to give up its asset to that end. Accordingly, I conclude that the Assignment was not entered into for the purpose of carrying on the Company's business, but rather to give its valuable asset to another company to exploit.

262. Assuming (for the present) that the Company did enter into the Assignment to facilitate the grant of valuable licences, as Mr Marsh and Mr Rowland said, limb (b) of s.238(5) requires there to have been reasonable grounds for believing that the transaction would benefit the Company. As Falk LJ emphasised, it is the Company itself that is the focus, not the group of which it was part. Here, Mr Smith seeks to rely on an incidental benefit, namely that SGL would end up with sufficient money to fund the Company's new activity of providing development services.

263. There were, in my judgment, no reasonable grounds for a belief that the Assignment would benefit the Company itself, as distinct from other members of the Serisys group. The Assignment deprived the Company of a valuable asset, and it was not released from its intra-group debt. It was left insolvent. No advice was taken by the directors of the Company prior to the Assignment, either as to the value of the IP asset or the appropriateness of a transfer on the terms of the Assignment. The Assignment did not provide for the Company to be able to continue to develop SAHL's IP. The Assignment was not disclosed to A Mitra & Co when the Company's accounts for 2017 were audited.

264. Further, there was no need for the Company to give away the IP in order for SSL to be able to license Adypt in Asia. Though the IP was assigned to SAHL, that company was not going to be a licensor: that would have defeated entirely the intended purpose of isolating the IP from a trading company and any claims by a counterparty. SAHL would have needed to grant a licence to SSL so that SSL could then enter into contracts with Asian banks and brokers. The short point is that the Company could have done the same, as it could with SSEL in Europe. While a licensee may have wanted to have a single licensor, as Mr Rowland explained, there was no evidence to support the THDs' suggestion that all the IP needed to be owned by a single person.

265. In short, it was never intended that the Company would benefit from the Assignment, nor were there reasonable grounds for believing that it would.

266. Accordingly, regardless of whether the directors of the Company entered into the Assignment in good faith (which I address further in Section VII) below, the requirements of the defence in section 238(5) are not met in this case.

VII. Was the Assignment a transaction defrauding creditors within section 423(1) of the 1986 Act?

267. Section 423(2) of the 1986 Act provides that where a person has entered into a TUV, the court may make an order, as it sees fit, for restoring the position or protecting the interests of victims of the transaction, if it is satisfied under subsection (3). This provides that:

> " … an order shall only be made if the court is satisfied that it was entered into by [the company] for the purpose –
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against [the company], or
> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make."

The purpose specified is usually referred to as the "prohibited purpose" and I shall refer to it in that way.

268. The question of whether the debtor entered into the transaction for a prohibited purpose is to be determined by reference to the subjective purpose of the debtor: Invest Bank PSC v El-Husseiny [2025] UKSC 4; [2026] AC 1 at [28], per Lady Rose and Lord Richards JJSC. It is not sufficient if a reasonable person would have had that purpose where the debtor in fact did not have it, nor is it sufficient that the transaction has a particular result: Re Ethos Solutions Ltd, Purkiss v Kennedy [2025] EWCA Civ 268 ("*Re Ethos Solutions*"), per Newey LJ at [18(ii)], citing Arden LJ in Hill v Spread Trustee Co Ltd [2007] 1 WLR 2404 ("*Hill*") at [86].

269. In his summary of the relevant law, Newey LJ continued at [18(iii)] of *Re Ethos Solutions*:

> "Thus, 'where the transaction was entered into by the debtor for more than one purpose, the court does not have to be satisfied that the prohibited purpose was the dominant purpose, let alone the sole purpose, of the transaction': JSC BTA Bank v Ablyazov [2019] BCC 96 ("*Ablyazov*"), at para 13, per Leggatt LJ. 'It is sufficient simply to ask whether the transaction was entered into for the prohibited purpose', and, 'If it was, then the transaction falls within s.423(3), even if it was also entered into for one or more other purposes': *Ablyazov* at para 14, per Leggatt LJ. In para 17 of his judgment in *Ablyazov*, Leggatt LJ said that the first instance judge had been 'correct' to ask whether the debtor had 'positively intended' to put funds beyond the reach of a creditor".

270. As to whose reach it is beyond which the debtor must positively have intended to put the funds, the answer is that it does not have to have been the particular person bringing the claim, or any particular victim. It is sufficient if the debtor intended to put funds beyond the reach of one or more persons, and the victim or victims in question were prejudiced by the transaction. See *Hill* at [101], per Arden LJ, approved by Newey LJ in *Re Ethos Solutions*. So an intention to put funds or an asset beyond the reach of creditors generally will suffice.

271. The question on the facts of this case is whether the directors of the Company at the time of the Assignment, Mr Marsh and Mr Rowland, positively intended by the Assignment to put the Company's IP beyond the reach of current or future creditors. The directors say that they did not do so: they made the Assignment only to ensure that the Company's IP was held (together with SSL's and SSTL's IP) by a single group company, with a view to the granting of licences to develop or use Adypt that were likely to be imminently needed. The looming or actual insolvency of the Company was, they say, nothing to do with the intention behind the Assignment.

272. The evidence that is relevant to this question starts in late 2014, at the time of the corporate reorganisation of Serisys. In an email dated 14 November 2014 to the directors of SSL, Mr Shovell commented that having a "horizontal" group structure, with one "clean" holding company and many sister companies below it, sounded like a good and "commercially necessary" idea: see the quotation at [173] above.

273. Serisys was duly structured in the way that Mr Shovell had proposed, with SGL as the holding company and the Company and SSL among others its wholly-owned subsidiaries. It is to be noted that Mr Shovell's concerns would have been adequately met if the Company and SSL had never been intended to be licensing companies. But that was not the case in respect of SSL.

274. In October 2015, as the prospect of the first licence of Adypt grew nearer, Mr Rowland sent Mr Porter an email which contemplated the creation of a new subsidiary of SGL for licensing purposes:

> "To keep the IP isolated in Serisys Limited, we should contract customers, e.g. LCH through a new company Serisys Solutions (Europe) Limited which will be 100% owned by SGL.
> Is it OK if you are the other director of this?"

At that stage, no further action was required.

275. However, Mr Rowland's thoughts on group structure continued, and on 3 November 2015 he emailed Hank Leung at Bird & Bird Hong Kong:

> "We are setting up another entity in the UK, Serisys Solutions (Europe) Limited, also wholly owned by Serisys Group Limited, to be the licensor and contracting party of services for UK customers. This then isolates the IP from any claims against SSEL by a customer.
> My question is, is there any advantage or disadvantage in 'consolidating' the IP into one entity, for example, through an inter-company purchase for $1 say, or is it OK/normal to have the IP somewhat geographically fragmented."

276. It is notable that Mr Rowland did not tell Mr Leung, as he said in evidence was his established experience of the banking sector by 2017, that counterparties for licences of Adypt would require all the IP to be in one place and licensed from a single source. (Nor did Bird & Bird in response, or at any time, tell him that that was the case.) His mind was clearly open as to whether there could be an advantage or disadvantage either way, and he asked for advice. The advice was nothing to do with separating the licensor from the owner of the IP, as Mr Rowland's email demonstrates.

277. The initial advice that came back was non-committal, pointing out some potential advantages and disadvantages of consolidation, focusing as much on trade marks as on copyright or other IP rights, and emphasising that it was desirable to work out the best structure from a tax perspective. Mr Leung invited Mr Rowland to a client seminar on IP asset structuring that he was preparing to host.

278. Mr Rowland went to the seminar and reported in an email to his co-directors of SGL, attaching a proposal for an initial Bird & Bird study to optimise the tax structuring of

Serisys. His commentary refers to transfer pricing issues and a discussion of the Base Erosion Profit Shifting programme of the OECD, which the proposal covered in some detail, indicating that valuation and pricing issues could arise. The email ends:

> "I recommend that we include the study (Eur 40-50k) in our 2016 budget. Though tax structuring might not be urgent, assigning our IP from SL and SSL to an IP holding company earlier might be wise."

This was an indication that it might not be ideal to wait until tax benefits were needed before the IP was consolidated. The previous month, Mr Rowland had told a partner of Mr Leung at Bird & Bird that SSL might have a customer signing up in Hong Kong soon, and asked whether another Hong Kong company should be established to contract, or whether SSL should contract but then the IP be later assigned to another entity.

279. The principal consideration, at this stage, therefore seemed to be that it was not desirable, for reasons that Mr Shovell had articulated, to have licences granted by the company that owned the IP.

280. Mr Rowland reverted to Mr Leung on 15 January 2016 saying that SGL would probably commission the full study from Bird & Bird in 2017, because tax was not an urgent issue, but that it was "still important and urgent to have the IP isolated from other entities". He therefore requested a fee and time estimate for a "tactical temporary solution", until execution of the next (tax-focused) stage, comprising:

i) Advice on the set up of a new Hong Kong IP-only entity, to be owned by SGL;

ii) Assignment agreements for all the subsidiaries' IP to NewHKCo;

iii) Licence agreements for NewHKCo to authorise SSL to license customers; and

iv) Licence and assignment agreement for NewHKCo and SSEL, under which NewHKCo would authorise SSEL to grant licences and SSEL would transfer any future IP in Adypt to NewHKCo.

Bird & Bird responded a few days later, providing fee quotations for each part of what was requested, and raising some issues about trade marks but no issue about the legitimacy of the "tactical temporary solution".

281. An aggregate cost for these steps of US$23,000 was included in the Finance, Legal and Marketing paper for the board of SGL on 26 January 2016. At that meeting, the board resolved unanimously that the "IP tactical entity structure" be implemented in Q2 of 2016, subject to finances.

282. By July 2016 (i.e. after Q2), Mr Marsh told an important investor, Mr Arthur, that only BOCI central purchasing committee approval was now needed, that it was unlikely that Adypt would fall at that hurdle, and that they had already exchanged several drafts of the contract with BOCI. In other words, a licence with BOCI – which was what Serisys desperately wanted, to pump prime its expansion – was expected soon. But the instruction to Bird & Bird to proceed with the "tactical temporary solution" was not given, nor did Mr Rowland prepare his own documents at that stage.

283. Again, at SGL's board meeting of 9 December 2016, it was reported by HK Mo that a BOCI steering committee meeting was expected the following week to decide whether to recommend Adypt to its Executive Committee (following BOCI's requirement for the selection process to be re-run). But nothing was done to instruct Bird & Bird then, or prepare home-made documents.

284. BOCI had indicated by March 2017 that they were not willing to become the first Adypt licensee, and Serisys was now focusing on the possibility of a deal with Bualuang in Thailand. At the June 2017 board meeting, it was reported that LSEG and DB each "wants to partner with Serisys" but no report of any impending licence with anyone was given. By July 2017, the position had become critical. On 10 July 2017, Mr Marsh noted that Serisys did not yet have its first Adypt customer and exhorted directors to secure the <u>US$600,000</u> that was needed by SGL to give him time to achieve this. On 19 July 2017, Mr Marsh was in touch with Mr Ma at BOCI, offering the licence agreement for 5 years for $5 with a draft licence and press release attached.

285. This was therefore a time of growing desperation for SGL. Mr Marsh was trying to entice BOCI, which otherwise did not want to be the first licensee of Adypt, to take a free licence in return for good publicity for Serisys.

286. SGL did not have a substantial investor willing to invest $3 million until there was a commercial licence in place. Despite what Mr Marsh said, I find that he would have told the board in June 2017 if there was such a person. The reason why he was playing his cards close to his chest in July and August 2017 was that he was negotiating privately with Mr Ma (discussions that he "never thought would see the light of day") to try to induce him to encourage BOCI's central purchasing committee to sign up to a first (free) licence, which could then trigger interest from the likes of NordEng or DB1 Ventures ("DB1") in making a substantial investment.

287. Had that happened, all SGL's difficulties could have gone away. But the expectation that BOCI would sign up was pure speculation, based on the belief of Mr Ma that he could influence BOCI's central purchasing committee's decision ("I had a verbal commitment of Gary Ma at this point"). BOCI's decision did not depend on Mr Ma, however. Indeed, Mr Ma's interest in Serisys was precisely what had derailed the original approval process of BOCI in November 2016. BOCI could not be induced by a free licence.

288. Mr Marsh did not tell the board about his negotiations. His reason was a bad one – that the negotiations were "informal". The true reason, I infer, was that he had taken the decision of whether to offer a free licence to BOCI out of the hands of the board.

289. Mr Harrison told Mr Marsh on 17 August 2017 that Serisys now needed big money ("heavy hitter / family office sort of money"). It was not obviously coming down the track. Mr Marsh was not making progress.

290. At or about this time (the evidence did not establish exactly when) Mr Marsh and Mr Rowland decided that they would cause the Company and SSL to assign their IP to a new company that would become SAHL. It was part of the strategy that the Company and SSL would both do this at the same time. The proposal for the Company and SSL to assign their IP was reported to the August board meeting of SGL, not for discussion or decision but for information. Mr Marsh and Mr Rowland had already decided that it would happen and that Mr Rowland would draft the necessary documents. This was

unusual, given that the board in January 2016 had decided that Bird & Bird should advise on the formation of a new company and prepare various documents in Q2 of 2016. It would also have been surprising for it not to be discussed and approved by the board of the sole shareholder in the Company, even if the directors of the Company and SSL had the power to transfer their principal assets, because it was an intra-group transfer and was being done for a reason.

291. Mr Marsh said that he did not understand it to be a major step, that it was merely administrative and was about the ability to grant licences. He said that Serisys "had to get the chain in place, as we had to send a licence to BOCI". However, he had already sent a draft licence to BOCI. He said that he told the board that a licence was about to be granted (the minutes do not record that) and that the decision had already been made to assign the IP, as Mr Rowland and he had understood that they did not need board approval. There was no discussion at the board meeting. The board members did not disagree, and so he "took it that they agreed" (the minutes record only that the intended assignments were "noted"). As Mr Mo had resigned as a director of the Company, Mr Marsh was appointed the second director, so that he and Mr Rowland could authorise the Assignment.

292. Mr Marsh said that "in our view", which I took to be him and Mr Rowland, it was essential to bring the two parts of the IP together in order to license them. He saw it as essential that there would only be one licence granted to a bank and that was because the bank would ask themselves: 'who is the contracting entity?', and then want to see the licence from the asset-owning entity. He said that there was always a place where all the IP was gathered.

293. The originally pleaded case of the THDs was that the Assignment was made as a result of an approach by one party in Hong Kong who wanted a licence, and another that was interested in acquiring the software outright, and consolidation of the IP was considered "<u>desirable</u>" to make the eventual licensing or sale for the benefit of Serisys "more straightforward". In the amended version, the word "desirable" was replaced with "<u>essential</u>", and the words "more straightforward" with "possible".

294. Mr Rowland agreed that the Assignment was a significant development, and said that the board of SGL had the opportunity to disagree, but did not do so, and that no one said anything about it. He said that the Bird & Bird initial advice and fee estimate gave him sufficient knowledge about what was required, and no legal advice was required.

295. Mr Rowland said that he could not recall saying at the board meeting why the IP was being assigned; he did not say in his evidence that it was because of an imminent licence to be granted. He said that Mr Marsh had told him in August 2017 that it was now urgent, as a licence with BOCI was close. It was not industry practice, he said, to take separate licences from the Company and SSL, the licensee would not want to see the IP held in two different entities. If there were two licensors, there would be a risk for the licensee as to which licensor was responsible. However, on being shown a specimen commercial licence, Mr Rowland agreed that a licensor can either own the software or acquire the right from the owner to license it, but said that it was standard practice in the financial services industry for there to be a single ultimate licensor. A transfer of the software to SAHL was therefore essential if Serisys was to grant a commercial licence.

296. What Mr Marsh described as an administrative step had therefore, according to Mr Rowland, always been a necessary step if Serisys was to turn its software to account. Yet that was never said to Bird & Bird as the explanation for needing an assignment – not even for the tactical temporary solution – nor did Bird & Bird advise that it was necessary. Despite an understanding about what banks supposedly expected, based on decades of experience in the financial services industry, Mr Marsh and Mr Rowland did not see the urgent necessity of transfers to SAHL until August 2017, even though at earlier times the negotiation of a licence to one or other licensee had been perceived as being almost concluded.

297. In my judgment, Mr Marsh's and Mr Rowland's arguments (I use the word advisedly) as to why there had to be all the IP in one place are confusing different issues. First, as a matter of practice, the IP usually is in one place, because this is strategically and financially or fiscally beneficial for the owner of the software. This is nothing to do with the licensee's requirements. Second, a substantial licensee will want to have a single counterparty (or joint licensors), so that there is no doubt which person is responsible for the whole of the rights granted by the licence. Third, the intending licensee will undoubtedly expect to do due diligence to establish that its counterparty has the right from the IP owner(s) to license the software. Whether there is a single owner of the software, or two or more, is a different matter. More than one owner may, I accept, give rise to a question of whether the licensor has the right to grant all that the licensee needs, but that is a matter for the due diligence process.

298. I was entirely unpersuaded by Mr Marsh or Mr Rowland that a licensee (bank) will refuse in principle to enter into a single licence for two complementary sets of software, granted by a single authorised licensor, because each set is ultimately owned by a different person. Mr Marsh's and Mr Rowland's explanations in the witness box, which were not entirely the same, are confusing the different issues identified above. Nor did they support in any event Mr Marsh's suggestion that the Assignment was merely an administrative matter. If they are right, this was a matter of the utmost importance to Serisys, and one for which one would have expected careful advice and drafting from Bird & Bird, to ensure that the documentation was in such form and with all content needed to satisfy the most demanding bank licensees.

299. Instead, it was rushed through in a "quick and dirty" way by Mr Rowland based on documents that he found online and adapted as he (not a lawyer) saw fit.

300. The board of SGL had agreed in January 2016 that it wished to see ownership of the IP separated from those who would be the licensors, to protect the IP against claims. That is understandable, but Mr Rowland had previously identified to Bird & Bird documentation other than the deeds of assignment themselves that would be required to enable the IP to be turned to commercial account. These included an agreement between SAHL and SSL, authorising SSL to license the IP, and an agreement between SAHL and SSEL: see [280] above.

301. If the reason for the Assignment was an urgent need to be ready to grant a commercial licence to BOCI, it is surprising that no step was taken to prepare all the documents envisaged to be needed, including the authority from SAHL to SSL to grant licences. Again, given the importance of having the correct documentation in place, it is surprising that Bird & Bird were not instructed to prepare appropriate documents. Instead, Serisys's own service provider acquired an off-the-shelf company that became SAHL, Mr

Rowland prepared home-made deeds of assignment, and no licence agreements between SAHL and SSL and SSEL were prepared. Mr Harrison confirmed that he would have remembered if the board had been told that a commercial licence was about to be granted, and that this was not said. I do not accept that Mr Marsh told the board in August 2017 that a licence was about to be granted.

302. I accept that an assignment of the IP to SAHL was a step that Serisys wanted to take in order to grant end licences. But the transfers to SAHL alone, done without reference to the board for a decision, without advice or assistance, and not enabling SSL to be ready to grant a licence, in circumstances where there was no real urgency, are suggestive of some other or additional reason for their execution.

303. In my judgment, the other or additional reason for the "quick and dirty" assignments was the impending threat to the solvency of the Company and SSL. Money was fast running out, as the prospect of valuable contracts and substantial investment receded. Although Mr Marsh remained ever optimistic, he and Mr Rowland knew that very large sums of money were needed to keep the Company and SSL afloat. While it was not inevitable that no such funding would materialise, there was a very good chance that it would not. The likely consequence of not paying HMRC, rent and staff must have been obvious to both of them in August 2017. Although there had been a history of last minute raising of money to keep SGL's subsidiaries afloat, the money was becoming relatively harder to raise by new investment, rights issues and loans as time went by. During that time, the debts of SGL's subsidiaries hugely increased.

304. In my judgment, despite their denials, Mr Marsh and Mr Rowland recognised that the finances of Serisys were under serious threat. SSL had been taken to the Labour Tribunal in Hong Kong and had had to settle cases for large sums payable in December 2017 that, as Mr Marsh admitted, SSL could not then afford to pay. SSL's deficit of current liabilities over current assets was far greater than the Company's. SGL was not in a position of being able to abandon one company to save another: it needed the contributions made by employees of both SL and SSL, and therefore had to finance both. SSTL was contributing some income from licences of Decide. Although transfer of the IP to a new group company was something that had previously been considered and approved in principle by SGL, the impetus for effecting that transfer in August 2017 was different. The main purpose of the Assignment at that time was to protect the IP that the Company and SSL owned from the consequences of possible insolvency.

305. I find that the directors of the Company did positively intend to ensure that its only valuable asset was beyond the reach of those who had claims against the Company, namely its growing list of creditors. The same applied in the case of SSL. The original purpose of the intended assignment to a new company had, after all, been to ring-fence the asset from adverse claims, so it is natural that the directors should have considered the Assignment in that light, which I find that they did. It is unnecessary to find that it was the sole purpose of the Assignment, and I accept that the Assignment was also a step along a road to a more desirable structure for commercial licensing, if Serisys ever got that far. But it was done mainly to protect the IP from adverse claims by creditors, and that is sufficient.

306. Accordingly, in my judgment, the Assignment was a TDC within the definition in s.423 of the 1986 Act.

307. The steps taken at that time by Mr Marsh and Mr Rowland were not steps that would have been taken by an ordinary decent person in their position with their knowledge of the value of the IP and the finances of the Company. It follows that the Assignment was not made in good faith by the Company, within the meaning of section 238(5) of the 1986 Act, and so for that reason too the defence in that subsection, addressed at [255]-[266] above, is not available to the Defendants.

VIII. Wrongful trading

308. Closely linked to the issues that I have already decided, but conceptually distinct, is GHSL's case that the directors of the Company are liable for its wrongful trading while insolvent.

309. One of many pleading points arose in relation to the wrongful trading claim, as GHSL attempted to argue that there was wrongful trading from 30 August 2017, or alternatively at some times between 30 August 2017 and 27 March 2019. The Defendants, while admitting that the Company was unable to pay its debts from at least October 2018, maintain that such a case is not open to GHSL, as it has only pleaded that there was wrongful trading from the date of the Assignment.

310. In the event, GHSL accepted in its closing submissions that the relevant date on which it had to prove its cause of action was 30 August 2017, the date of the Assignment.

311. Section 214 of the 1986 Act provides (so far as material):

> "(1) Subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company's assets as the court thinks proper.
>
> (2) This subsection applies in relation to a person if—
> (a) the company has gone into insolvent liquidation,
> (b) at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation or entering insolvent administration, and
> (c) that person was a director of the company at that time;
> but the court shall not make a declaration under this section in any case where the time mentioned in paragraph (b) above was before 28th April 1986.
>
> (3) The court shall not make a declaration under this section with respect to any person if it is satisfied that after the condition specified in subsection (2)(b) was first satisfied in relation to him that person took every step with a view to minimising the potential loss to the company's creditors as (on the assumption that he had knowledge of the matter mentioned in subsection (2)(b)) he ought to have taken."

312. As regards Mr Marsh and Mr Rowland, and also any of Mr Porter, Mr Harrison and Ms Sun whom I may find to have been shadow or de facto directors of the Company (which I address in the next section), the relevant initial questions are, accordingly, whether by that date and as a result of the Assignment, there was no reasonable prospect that the Company would avoid insolvent liquidation or administration, and second, whether each of the directors either knew that or ought to have concluded that that was the case at that time.

313. In my judgment, Mr Marsh and Mr Rowland were aware that SGL's and accordingly the Company's finances were very tight and that there was a real possibility that it would be unable to continue, and might be wound up, or have to enter administration. That was the main reason why the Assignment was made at the time that it was. However, they did not know that there was no reasonable prospect of avoiding that. They knew that, although money was very tight, and there was a real risk of winding up, some shareholders of SGL (and hopefully enough of them) would be willing to invest more money to maintain cash flow, hopefully until a first commercial licence was granted. Serisys had come a long way: many millions of dollars had been invested in Adypt, and the investors would not easily abandon the product in which they all had faith. Between September 2017 and November 2018, SGL did in fact raise over $1.5 million in this way. SGL also obtained relatively small loans from those connected with it, such as Ms Sun, who lent SGL US$100,000 on 31 August 2017.

314. Further, the prospect of negotiating a commercial licence was not hopeless, and there was a realistic chance that this could happen. By August 2017, it was reasonably clear that it would not happen first with a top level stock exchange, such as LSEG or DB, or a first-tier bank, but it could well have happened with a smaller bank or broker. Once that had happened, there was a realistic prospect of other banks or brokers following suit, and of investors such as DB1 and NordEng being willing to invest large sums. It was, correctly, recognised by the board of SGL that it was the initial licence agreement that would be likely to unlock further agreements and more investment, which could then follow relatively quickly and transform SGL's financial position.

315. On this issue, I feel that I can rely on the evidence of Mr Harrison and Ms Sun, who both struck me as astute and knowledgeable. Mr Harrison warned Mr Marsh in April 2017, as reported in emails of 5 April and 22 April 2017 to Mr Rupert Bull of The Disruption House, that he ought to be focusing on selling licences to smaller regional businesses in the first instance, and that the larger customers and investors would follow.

> "My line is close a few medium sized clients in Asia and leave the big guys (where getting a contract will take 6-12 months of costly pre-sales) until later … I think he will go there.
> ….
> I'm still very confident about the end-game … just need a few Asian brokers signed up first."

These were companies such as CMS, AMTD and Mikuho Securities in Hong Kong and Bualuang in Thailand, from all of which Serisys was generating interest.

316. Ms Sun emailed Mr Rowland on 20 June 2017:

> "I think the better wording (and reality) for [NordEng] is that they are closely monitoring company, with next milestone they are looking for is the official signing of customers for ADYPT (i.e. Bualuang). As mentioned in previous email on my dialogue with MX Hu and Shanghai team, their investment profile target seeks profitability of companies they invest in. As such, I think there is a 50/50 chance of them participating in next round (if only Bualuang) and >50% if there is progress with DB, LSEG and/or BOCI."

317. Mr Harrison's assessment prior to the end of August was that substantial money was now required. On 1 September 2017, he told Mr Arthur: "I see a real cash flow crisis coming down the line (not short term)." Mr Arthur and he agreed that there would be no private equity money until a client signed up for a licence.

318. These were two recently appointed non-executive directors of SGL, who were appointed for their experience, knowledge of financial services entities and their contacts books. They were both well-informed and had sound judgement. Mr Harrison certainly realised that the cash flow forecasts could not be relied upon and that Mr Marsh was unduly optimistic and that what he said about progress was not reliable, so he was exercising independent judgement. It is difficult to say that, objectively at the relevant time, the directors should have concluded that there was no reasonable prospect of avoiding insolvent liquidation when the perception of these individuals, who were not heavily invested in SGL as Mr Marsh and Mr Rowland were, was that there was a reasonable chance that all would be well eventually. Ms Sun lent $100,000 to SGL on 31 August 2017 believing this to be so. Even on 25 October 2017, Mr Harrison said in an email exchange with Mr Marsh that although he did not see LSEG or DB closing that year, he was not saying that they were not serious opportunities. He repeated this view in an email to Mr Arthur on 2 November 2017, recognising that SGL needed to deliver a client within the next 6 months.

319. While the August 2017 cash flow forecast was too optimistic, all the cash flows depended on a business judgement about when licences might be agreed, and when funders would be willing to fund. Cash flow also depended on raising further money by way of loans and rights issues from smaller investors. Although the Company was in fact cash flow and balance sheet insolvent, as I have found, the position was still able to be recovered if a licence was agreed, or substantial funding was injected, within a few months of the date of the Assignment. Neither possibility should in my view have been written off by the directors by the end of August 2017. This was not blind optimism falsified at the time by objective facts; it was a judgement call, and I am not persuaded that, as at 30 August 2017, it was objectively plainly wrong.

320. By the end of October 2017, however, SGL's position, and so the Company's position, was looking much more precarious. The combination of the HMRC letter warning of a winding up petition and the inability to pay staff and rent was a significant threat. Mr Harrison accepted that this was the first time that he realised how serious the position was. He realised that Adypt could be lost if the Watford staff were not paid.

321. SGL was about to go cap in hand to investors to offer shares at a twice-reduced price, to get in enough cash with which to keep going while waiting for the first licence to be sold. The fundraising nevertheless worked, up to a point, as a little less than US$500,000 was subscribed. True it is that some of Mr Marsh's emails to shareholders or investors sent in August 2017 were misleading about the status of negotiations with LSEG: the November

rights issue was based on a prospectus and letter that said only that Serisys was in discussions with LSEG and DB "who are considering becoming utility providers", which was very general. By that time, however, Mr Marsh had revealed Mr Allen's email of 22 August 2017, including to representatives of the dissentient minority shareholders.

322. Mr Harrison recognised that the money raised by the November 2017 rights issue was not sufficient on its own to sustain SGL for very long, and referred to "kicking the can down the road", but it was nevertheless money that enabled SGL to keep going. SGL managed to keep going until October 2018 before its finances went into free-fall. While there remained, in August 2017, as there was, a real chance that the first commercial licence would be achieved and announced, there remained a chance that Adypt would take off. If that happened, SGL would have been able to pay off the Company's current debts, and the intra-company debt could have been dealt with at any time.

323. In my judgment, there was, accordingly, a reasonable chance that the Company would avoid going into insolvent liquidation or administration. That is what all the directors of the Company believed in August 2017. They continued to invest or lend their own money. It cannot be said that they ought to have known that there was no reasonable prospect of avoiding that, or that their belief was irrational. With more adroit and effective work by those engaging with potential customers, it might well have come to fruition.

324. I therefore dismiss the claim based on wrongful trading. It is unnecessary to consider in detail whether, if there was no reasonable prospect of survival, the directors took every step with a view to minimising the potential loss to creditors that they ought to have taken. Suffice it to say that the directors did not, on the evidence that I heard, have any regard to creditors other than themselves and SGL, and allowed the Company to continue incurring further liabilities, wholly for the benefit of SAHL and through it SGL. No independent financial or insolvency advice was taken, and in November 2017 the directors ignored warnings from Mr Hubbard of insolvent trading without taking those important steps to protect creditors. The directors clearly did not take every step to minimise loss to creditors.

325. If I had found there to have been wrongful trading from 30 August 2017, I would have had to assess the increase in net deficiency of the Company's assets. Both GHSL and the THDs, who addressed this issue on behalf of the Defendants, worked from SGL's management accounts and cash flow forecasts to identify the net "unconnected" liabilities of the Company at relevant times. As at 31 August 2017, the current liabilities (which excluded intra-company debt) of the Company were $481,201 and as at 31 January 2019 (the last set of management accounts) they were $625,618, an increase of $144,417. Over the same period, SGL injected funds of $1,049,142.04, thereby limiting the increase in current liabilities (indeed, as at September 2018, they were lower, at $415,298), and the connected debt (including director loans) increased by $1,078,932 from $3,687,016 to $4,765,948.

326. Mr Smith submitted that, for wrongful trading purposes, I should consider only the unconnected loans, as there was no evidence that the connected debt would be called in, and SGL had agreed to subordinate its debt to that of other creditors. He suggested that, by adding a proportionate sum for the undocumented months of February and March 2019, the increase in debts owed to unconnected parties over the period of (assumed) wrongful trading was therefore 19/17ths of $144,417.

327. Mr Riley's approach on behalf of GHSL was to aggregate the total losses shown in the management accounts for London (i.e. the Company) for the periods September to December 2017, the whole of 2018, and January 2019, then adding an averaged monthly loss over the whole of that period to represent losses in February and March 2019, which amounts in total to $1,638,796. These are based on all the operating expenses of the London office, some interest, and no countervailing income.

328. Although the two approaches are slightly different, in substance what is being measured is the same, save only that Mr Smith has left the increase in liabilities to SGL and other connected persons out of account and disregarded any slight changes in the value of assets (which were relatively small). SGL funded much of the additional expenditure in the period in question but did not do so gratuitously. The money advanced was shown in the accounts as a longer term liability of the Company to SGL.

329. What is required in principle is to identify the net increase in the deficiency of assets over the period of wrongful trading. Strictly, therefore, the total increase in liabilities must be compared with any change in the amount of valuable assets. Focusing only on changes in the amount of current liabilities is only a part of the exercise that is required. I therefore prefer Mr Riley's approach in principle.

330. I would not have excluded the intra-company debt when assessing the increase in the deficiency of assets. SGL chose to lend money to the Company rather than write it off as R+D expenditure for its own benefit. The SGL financial support letters on which Mr Smith relies for the proposition that SGL's debt will not compete or rank *pari passu* with the Company's creditors do no such thing. It is merely an agreement not to demand repayment prior to liquidation unless the Company would remain solvent:

> "We acknowledge that we will not seek or demand immediate repayment from the Company of any loans or funds which we have made available in order to meet the Company's financial obligations, and neither, in the event of the liquidation of the Company, would we demand repayment of such funds immediately prior to its liquidation, except where the Company would remain solvent immediately after the repayment of any such debt."

331. Accordingly, the right figure for the increase in the deficiency during the period 31 August 2017 to 27 March 2019 is US$1,638,796.

IX. Who were the directors of the Company at the time of the Assignment?

332. It is not in dispute that Mr Marsh and Mr Rowland were directors. None of Mr Porter, Mr Harrison and Ms Sun were *de jure* directors of the Company, as opposed to SGL, but GHSL's pleaded case is that each of them was a shadow director of the Company, alternatively acting as a de facto director in making decisions in relation to its affairs.

333. The relevant paragraphs of the Amended Particulars of Claim read:

> "SL did not have separate board meetings, instead, all of its business and legal decisions were taken by the First to Fifth Defendants as part of SGL board meetings and/or as part of SL board meetings held simultaneously with

SGL board meetings. The Second Defendant's 23 September email to SL's liquidator confirmed that:

> '*SGL board meetings were held for SGL and also acted as a decision making forum also for its subsidiaries*'.

Accordingly, in making decisions in relation to the business and affairs of SL at board level, the Third to Fifth Defendants were acting as de facto directors of SL. Further or alternatively, insofar as they gave instructions or made decisions on which the First and Second Defendants acted, the Third to Fifth Defendants were acting as shadow directors of SL"

334. Following the conclusion of the evidence, I suggested to Mr Riley that the evidence in support of the case of shadow or de facto directorship on the part of Mr Porter, Mr Harrison and Ms Sun was not very compelling. In light of that, GHSL does not pursue its case on shadow directorship but does pursue its case on de facto directorship.

335. It is therefore unnecessary for me to address a pleading point raised in opening by Mr Mills on behalf of the JPPDs that the case on shadow directorship was inadequately pleaded.

336. There is no definition of "de facto director" in the Companies Act, unlike "shadow director", but the definition of "director" in s.250 is:

> "In the Companies Acts '*director*' includes any person occupying the position of director, by whatever name called."

337. In Revenue and Customs Commissioners v Holland [2010] UKSC 51; [2011] Bus LR 111, the Supreme Court held that Mr Holland was not acting as a de facto director of group companies where he acted as the de jure director of a corporate director of the companies in question, and that the mere fact that Mr Holland acted as a director of the corporate director was not sufficient to make him a de facto director of the group companies as long as his activities were properly within the ambit of his responsibilities as a director of the corporate director, in which case they should be attributed to that role:

> "So long as the relevant acts are done by the individual entirely within the ambit of the discharge of his duties and responsibilities as a director of the corporate director, it is to that capacity that his acts must be attributed." [42]

338. The question of how to prove a de facto directorship was addressed by Lord Hope of Craighead DPSC in the following passage at [39]:

> "It is plain from the authorities that the circumstances vary widely from case to case. Jacob J declined to formulate a single decisive test in *Secretary of State for Trade and Industry v Tjolle* [1998] 1 BCLC 333, as he saw the question very much as one of fact and degree. He was commended by Robert Walker LJ in *In re Kaytech International plc* [1999] 2 BCLC 351, 423 for not doing so, and I respectfully agree that there is much force in Jacob J's observation. All one can say, as a generality, is that all the relevant factors must be taken into account. But it is possible to obtain some guidance by

> looking at the purpose of the section. As Millett J said in *In re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180, 182, the liability is imposed on those who were in a position to prevent damage to creditors by taking proper steps to protect their interests. As he put it, those who assume to act as directors and who thereby exercise the powers and discharge the functions of a director, whether validly appointed or not, must accept the responsibilities of the office. So one must look at what the person actually did to see whether he assumed those responsibilities in relation to the subject company."

339. The relevant principles, distilled in part from the *Holland* case, were summarised by Arden LJ in Smithton Ltd v Naggar [2014] EWCA Civ 939; [2015] 1 WLR 189 ("*Naggar*"):

> "35 A person may be de facto director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.
> 36 To answer that question, the court may have to determine in what capacity the director was acting (as in Holland's case).
> 37 The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.
> 38 The court is required to look at what the director actually did and not any job title actually given to him.
> 39 A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.
> 40 The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances in the round (per Jonathan Parker J in Secretary of State for Trade and Industry v Jones [1999] BCC 336).
> 41 It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.
> 42 Relevant factors include: (i) whether the company considered him to be a director and held him out as such; (ii) whether third parties considered that he was a director.
> 43 The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.
> 44 Acts outside the period when he is said to have been a de facto director may throw light on whether he was a de facto director in the relevant period."

340. In Re Mumtaz Properties Ltd [2012] 2 BCLC 109, Arden LJ had previously said that the first step was to examine the governance structure of the company in question, to see whether the defendant was part of that structure – was he "part of the nerve centres from which the activities of the company radiated?"

341. It is in my judgment salutary to remind oneself, as Jacob J did in Secretary of State for Trade and Industry v Tjolle [1998] BCLC 333, that the consequence of holding someone to be a de facto director is that they are then liable as fiduciaries and may be statutorily

liable where the company becomes insolvent. They self-evidently should not be "liable for events over which they had no real control, either in fact or law" (343-344). Accordingly, the test is whether a person has assumed responsibility and liability for the company's acts, as a director, despite not being validly appointed a director.

342. Similarly to the *Holland* case, the JPPDs in this case each had a different capacity in which they were acting at the material time (August 2017), namely as a de jure director of SGL. SGL was the sole shareholder of the Company (and of SSL). It therefore ultimately controlled who should be the directors of each subsidiary. At SGL's 22 August 2017 board meeting, it appointed Mr Marsh to replace Mr Mo. Mr Rowland had been a director of the Company since 2013.

343. The Company at all relevant times had two directors who were well-placed to take legal and business decisions for the Company that were directorial in nature rather than merely managerial. The directors were also directors of the parent company, SGL.

344. My attention was not drawn to anything in the constitution of the Company that was unusual in any way and I assume that it therefore had basic Table A articles of association or something close to it. These would have required decisions of directors to be taken at a meeting, or informally but unanimously. Decisions could therefore be taken by Mr Rowland and Mr Mo, and after August 2017 by Mr Rowland and Mr Marsh anywhere, including at SGL board meetings, if they agreed.

345. There were nonetheless independent board meetings held by the directors of the Company, but not many. Mr Mills was able to identify evidence of properly constituted independent board meetings, in the form of minutes in most cases, but in one case a reference in the minutes to a previous meeting, held on 1 August 2013, 16 May 2014, 12 June 2014, 29 June 2015, 14 June 2016, 25 June 2016, 30 August 2017 and 17 December 2018. Thus, the Company held a formally recorded board meeting at least once a year, mostly to deal with approval of its statutory accounts and the reappointment of A Mitra & Co as auditors. Although not directly relevant, there is also evidence that SSL held independent board meetings on 6 occasions, four after the corporate reorganisation that saw SSL be downgraded from the holding company to a subsidiary of SGL.

346. Significantly for the matters in dispute in this claim, there is a disclosed board minute of the Company for a meeting on 30 August 2017, at which Mr Marsh and Mr Rowland are recorded to have resolved to cause the Company to enter into the Assignment. The document bears their signatures. Notice was given to the THDs disputing the authenticity of this document, but it was not disputed on the pleadings as between GHSL and the JPPDs. I am satisfied that the minute accurately reflects a meeting between Mr Marsh and Mr Rowland where it was decided to assign the Company's IP to SAHL. In fact, the Assignment deed was executed by Mr Marsh and Mr Rowland on behalf of the Company.

347. Mr Mills on behalf of the JPPDs pointed out that there is no plea that Mr Porter, Mr Harrison or Ms Sun made any decision on behalf of the Company, only that they approved and caused the Company to enter into the Assignment, and then caused or allowed the Company to continue to provide services to SAHL after the Assignment. If the JPPDs approved the Assignment, they only did so as members of the board of SGL, at the meeting on 22 August 2017 or at the following meeting on 17 October 2017, where

the Assignment was reported. There was no evidence that board meetings of the Company took place during, or simultaneously with, board meetings of SGL.

348. The business of the Company was of course a limited one: it was never intended that it should trade in a full sense. It employed between 6 and 7 employees who worked full-time on a single software development project, rented modest offices, was funded directly by SGL and arranged its payroll, tax, rental and accountancy affairs accordingly. The governance and directorial acts needed by the Company were limited in nature. Although there was monthly payroll, PAYE and NICs to pay and a rent liability to meet, performance of these functions was managerial in nature, rather than directorial. There were therefore long periods of time in which, in reality, there was nothing for the directors of the company to decide.

349. As sole shareholder, SGL was in a position to authorise or ratify acts on behalf of the Company in excess of directors' powers, where appropriate. The Serisys group as a whole was governed through its parent company, SGL, as each of the subsidiaries had a role to play in relation to what was essentially a single business looking at different sectors. It is therefore natural that the affairs of the group enterprise, including matters that related to the role of each subsidiary, were considered at board meetings of SGL. GHSL was, as a result, able to point to numerous examples of matters relating to the Company's work and status being discussed at SGL board meetings, but this does not prove that those present were acting as the directors of the Company.

350. It is clearly inadequate for GHSL to contend simply that decisions of a directorial nature relating to the Company were taken by SGL at its board meetings. That would, at best, amount to a case that SGL acted as a de facto director of the Company as well as being its sole shareholder, or alternatively show that Mr Marsh and Mr Rowland were taking decisions on behalf of the Company, as its de jure directors, with the approval of the other directors of SGL. The fact that, as was admitted by Mr Rowland in his email to the Company's liquidator, SGL board meetings also acted as a decision-making forum for its subsidiaries does not advance the case that one or more of the JPPDs acted personally as a de facto director of the Company.

351. GHSL relies on the fact that SGL's board from time to time addressed operational matters of the subsidiaries, such as cash needs, salaries, staff reductions and the possible closure of the Watford and Hong Kong offices. This is hardly surprising as SGL was funding each of the Company, SSL and SSTL. Overall commercial strategy was a matter for SGL. There is no evidence, however, that SGL took decisions not to pay employees, or rent, or tax. Rather, the inability or failure of the Company to pay was reported to the directors of SGL, which then had to consider what could be done. Nor is there evidence that SGL took any decision about reduction of staff or closure of the Watford office, which would have been a decision required to be taken by directors of the Company.

352. The nearest that GHSL gets is the SGL board minutes of 9 and 19 December 2016, at which it is shown to have considered a restructuring plan for Serisys in the event that BOCI decided not to approve the use of Adypt. This included staff reductions at the Company and SSL and the discussion. There is also the discussion at the 17 October 2017 board meeting of contingency plans, where it was agreed that if funding was not soon realised, key personnel in Watford would be "informed of the board's perspective" and, if necessary, the Watford and Hong Kong offices would be closed.

353. As to the first of these, there was no decision taken: the board merely discussed a restructuring plan for the group. There was to be another board meeting in the event that BOCI did not agree. Any decision to axe staff at the Company (which did not happen), even if later taken in principle by SGL, would have to be taken and implemented by the Company. As for the contingency plans, the decision to inform key employees of contingency plans is not directorial in nature, only managerial, and any decision to close the offices would presumably have been taken by the Company and SSL, even if it was in light of a decision already taken by SGL to implement a contingency plan on behalf of the group.

354. There is in fact no evidence of a decision that was properly for the Company's board of directors, such as amount of salary increases or bonuses, having been taken by SGL instead of the Company. The evidence was that responsibility for the Company's affairs was taken principally by Mr Rowland (and before him by Dr Rhodes), with the agreement of Mr Mo or Mr Marsh as the second director, and with Richard Barnes being the manager of the Company's operations on the ground. Mr Rowland was identified in pre-audit questionnaires as having responsibility for operations, not the JPPDs, and similarly for dealings with HMRC and the auditors. Funding of the Company was a decision for SGL, not the Company. It is notable, in my judgment, that the JPPDs did not receive the Company's monthly management accounts: they only received the group financial statements that went to the board of SGL.

355. In a similar vein, the fact that the JPPDs were updated by the executive directors of SGL between board meetings on matters such as negotiations between HMRC and the Company and lack of cash to meet payroll or rent is hardly surprising, as the threat of insolvency of the Company threatened the existence of Serisys as a whole, and funding of the group companies was a matter for SGL. Ms Sun's evidence that she considered that the board of SGL should have been updated on the Hong Kong Labour Tribunal claims does not support a conclusion that decisions needed to be taken there about SSL, but rather that the reputational or financial impact of such claims was a matter for the board of SGL to be concerned about.

356. GHSL also relies on the fact that, in promotional materials, Mr Porter was held out as being a director of "Serisys". This clearly goes nowhere, as Serisys was the name used by the corporate group and Mr Porter was a director of the group company. Board minutes of 14 July 2015 record that the board was reminded that all marketing activities of Serisys and Adypt in the UK were to be done only by Mr Marsh and Mr Porter, however, as Mr Porter said, his service company had a consultancy agreement with the Company, under which he had no authority to bind the Company. Mr Porter had responsibility for cultivating London Clearing House as a client, which he said was agreed with Mr Marsh to be pursuant to his consultancy. In any event, although the Company was developing the software, it was not going to be granting licences: another group company, SSEL, would be the contracting party. So Mr Porter's services, though nominally provided to the Company, were in reality services to the group, Serisys. Similarly, the fact that Ms Sun was giving guidance and helping in Asia to target potential investors or funders for Serisys does not remotely mean that she was being held out to be a director of any company except SGL, nor was she in fact so held out.

357. There is therefore, in truth, little more on which GHSL can rely except for the 22 August 2017 board meeting of SGL. In this regard, the pack of documents for the meeting states only, in relation to Legal matters:

> "Assign ADYPT IP to Serisys Asset Holdings Limited, a Hong Kong company 100% owned by Serisys Group Limited"

and the minutes record:

> "The Board noted that the ADYPT IP will be assigned from Serisys Solutions Limited and Serisys Limited to Serisys Asset Holdings Limited (a Hong Kong company wholly owned by Serisys Group Limited)".

358. Mr Riley tried valiantly, with each of the principal Defendants, to get them to admit that there was a debate about the assignment proposal, and that a decision was taken by those present at that meeting to approve the assignment of the Company's IP. Each of the Defendants denied it, with Mr Marsh and Mr Rowland explaining that they had already taken the decision in principle (evidenced by the instructions 7 days before the board meeting to incorporate SAHL) and that they were merely reporting it to SGL's board. The JPPDs all said that they were unable to recall any discussion, questions or request for express approval, and that it was said to be progressing on the advice of Bird & Bird. It was ultimately GHSL's case that the board minutes were deliberately covering up the fact that there was express agreement on removing to a safe place the only valuable assets of the Company and SSL, in view of the financial difficulties that they were in.

359. I will deal with the allegation of conspiracy in its proper place, below at Section X. For present purposes, it is sufficient to say that there is nothing in this suggestion that supports a case that the JPPDs were assuming the responsibilities of directors of the Company for deciding what to do with its principal asset, as opposed to either acting as directors of SGL (which is the Defendants' case) or acting dishonestly and wrongly by supporting the executive directors' decision to hide the asset from the Company's creditors (which is GHSL's case). I have no proper basis for finding that proved. It is much more likely, in my view, that Mr Rowland and Mr Marsh had resolved to do it, for the predominant reason of protecting the asset, as I have already found to be the case, and that the other board members – who were not being asked for a decision – simply noted it, as the minutes record. None of the necessary detail for a decision to approve the Assignment was presented. The JPPDs did not ask questions about it, in Mr Porter's case because he knew (as Ms Sun also believed to be the case) that such an assignment had been proposed and approved previously by the board, and otherwise because, on the face of it, and assuming solvency, the proposal was neutral so far as SGL was concerned, and was reported to be being done on the basis of legal advice.

360. In terms of the allegation that the JPPDs had assumed the responsibilities of acting as directors of the Company, it is relevant also to note that Mr Harrison and Ms Sun had only lately come on board SGL as non-executive directors, Mr Harrison at the end of February 2017 and Ms Sun in March 2017. They had each been recruited to bring particular experience and contacts to SGL (as had Mr Porter too), rather than to perform a more traditional non-executive function, but certainly not to perform an executive role. They both regarded themselves as there to help in particular areas where they could contribute expert knowledge and a contact book, and all three only had limited time to give.

361. Ms Sun had a serious illness that was being treated intensively between Spring and Autumn 2017 and I accept her evidence that she was performing well below par, and not giving the attention to SGL as a non-executive director that she otherwise would have

done. The idea that she was, despite that, taking on the responsibility of making directorial decisions of the Company is improbable and unpersuasive. Mr Harrison said that it was understood between him and Mr Marsh that he would only be able to devote limited time to SGL's business. For the August 2017 board meeting, he said that he was on holiday at the time, and not fully focused. I find that he understood fully the implications of the cash flow forecast, namely that there was a cash flow crisis coming, but not in the short term, and that, on the basis that the assignment was said to have been advised by Bird & Bird, he did not feel that he could question it. I accept the evidence of the JPPDs that the issue of the Assignment was not presented as a matter for decision by the SGL board.

362. Whether any of the JPPDs knew about the insolvency of the Company, in August or October 2017, is a different question from whether the JPPDs were acting as directors of the Company at the SGL board meeting in August 2017. In my judgment they were not, they were acting as not very assiduous non-executive directors of SGL, following the executives' lead, and focusing on how Serisys could land one of the opportunities that could bring the group financial success.

363. I am, in the final analysis, very clear that none of the JPPDs had assumed the responsibility of making directorial decisions for the Company. There is no need to infer that that is what they were doing, alongside Mr Marsh and Mr Rowland, because they were involved alongside them acting in a different capacity, namely acting as directors of SGL. There is no basis for the contention that the JPPDs were also acting at the same time in a different capacity. They were given very little relevant information about Serisys's financial affairs and were not well placed to take responsibility for its affairs. The Company was a member of a group effectively running a single business. SGL was considering and taking strategic decisions on behalf of the group as a whole. The acts of a directorial nature required from directors of the Company were limited, in view of the corporate structure of the group, and these were, effectively, performed by Mr Rowland, with Mr Mo's or Mr Marsh's informal consent and, on occasions, as required, formally documented. The Assignment was an exceptional matter that required the directors' authorisation, which it received through the board resolution dated 30 August 2017 signed by Mr Marsh and Mr Rowland. It did not involve anyone other than those Defendants acting as directors of the Company.

364. For these reasons, I reject the claim based on Mr Porter, Mr Harrison and Ms Sun being de facto directors of the Company at the date of the Assignment.

365. As for the period after that, when the Company continued to develop Adypt, thereby providing in effect a free service to SAHL, there is nothing to support a case that the JPPDs later assumed the responsibility of acting as directors of the Company. They all took responsibility for trying to obtain funding and licensees for SGL, but there is no evidence that they took decisions of a directorial kind for the Company.

366. Indeed, what happened after 30 August 2017 was that the Company simply carried on as if the Assignment had not taken place. Mr Marsh and Mr Rowland did not consider on what basis the Company was continuing to carry on its work, and no decision appears to have been taken by the Company either to cease business or negotiate terms with SAHL or SGL. The matter was dealt with strategically, by inaction rather than any decision-making, by SGL.

367. I have already dealt with the board meeting of SGL on 17 October 2017 in this regard. Contingency plans if funding did not materialise were a matter for SGL; notifying staff of possible closure was not a directorial decision, and the decision to close Watford or Hong Kong was never taken, as the group just about managed to keep enough positive cash flow. There was no evidence of a positive decision taken not to close Watford and to keep the employees working: that was the default position. For as long as SGL continued to provide sufficient funding, the Company would continue to be able to employ the staff in Watford.

368. The JPPDs continued to act on the board of SGL, which made all the strategic decisions as the parent company of the group.

X. Are the JPPDs liable for conspiracy to cause harm or as dishonest assistants in breaches of trust?

369. The case against the JPPDs is also pleaded against them on the basis of tortious and equitable wrongdoing: conspiracy to injure the Company by unlawful means, and dishonest assistance in a breach of trust.

370. I have found that the directors of the Company transferred its IP in Adypt to SAHL at a huge undervalue for the purpose of protecting it from creditors. That was therefore a clear breach of the duties that, at the time, Mr Rowland and Mr Marsh owed to the creditors of the Company rather than SGL, because the Company was by that time insolvent.

Conspiracy

371. The TDC and the breach of duty are unlawful means for the purpose of the conspiracy claim, and it is unnecessary at this point to consider whether there were other breaches of duty. I have found that there was no wrongful trading.

372. The case pleaded against the JPPDs is complex and somewhat convoluted. Essentially, it is that they colluded at the 22 August 2017 board meeting of SGL and in the immediate aftermath of it to take the Company's only valuable asset away from it, and agreed that it would continue in business, providing gratuitous services for the benefit of SAHL and SGL while it was insolvent.

373. The issues (other than causation and loss) that arise under the conspiracy claim are, accordingly:

i) Was there a sufficient combination between the directors of the Company and any of the JPPDs or SAHL to do the alleged acts?

ii) Was there any intention on the part of any of the JPPDs to injure the Company or its creditors?

374. The combination will be established if the JPPDs or SAHL acted together with Mr Marsh and Mr Rowland with a common intention or objective, which need not be expressed but may be tacit, to achieve a common end: Kuwait Oil Tanker Co SAK v Al Bader [2000] 2 All ER (Comm) 271 ("*Kuwait Oil*").

375. Whether a combination is established if one of the participants is merely passive was answered in Lakatamia Shipping Co Ltd v Su [2021] EWHC 1907 (Comm). Bryan J held that it may be, as this is clear from the criminal law of conspiracy, as it was applied to civil claims in *Kuwait Oil*, but that whether passivity suffices depends on all the facts and circumstances of the case. The example given by Bryan J was that given by O'Connor LJ in R v Siracusa (1990) 90 Cr App R 340:

> "If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity".

Bryan J commented, at [98]

> "Thus there will be passive participation where a majority shareholder and director "consents" (which can be inferred) to a minority shareholder using a company to smuggle drugs. In that scenario the majority shareholder and director has the legal control over the day-to-day operations of the company (through a directorship), and also benefits economically from the same (through a shareholding). As Madam Su acknowledges, in that context it is quite obvious that by knowingly allowing his company to be used, he can be inferred to be a participant by his failure to stop the unlawful activity."

Thus, standing by and doing nothing will be taken to be consent and participation where it is obvious what the consequence of that will be and that, objectively, it is unlawful and can and should be prevented. The example given is of a case where the defendant had the power to prevent the company's unlawful actions.

376. The intention to injure need not be the predominant purpose of the combination, and it will be sufficient if the conspirators' interests will be advanced at the expense of the claimant's interests, where they are inseparably linked: OBG Ltd v Allen [2007] UKHL 21, per Lord Nicholls at [167].

377. What is principally alleged on the facts of this case is an agreement (at least a tacit one) at the 22 August 2017 board meeting of SGL to strip the Company of its valuable asset, the objective being to secure Adypt in a 'clean' subsidiary, away from the Company's creditors' reach. Mr Porter agreed that the effect was going to be that the IP would be "isolated", whereas Ms Sun regarded it as a legacy issue of "consolidation" of the IP in one place.

378. There is also a plea that there was a combination for the provision of free services by the Company after the Assignment, and a combination to carry on wrongful trading. I am unimpressed by Mr Mills's pleading point that these are only pleaded conjunctively by GHSL and so it must succeed on all three elements – Assignment, free services and wrongful trading – before the conspiracy claim can succeed.

379. The principal case is based on the Assignment. Since, on any view of the evidence, the JPPDs clearly did not know any of the terms of the proposed assignment at the date of

the board meeting or before the Assignment was executed, the allegation based on provision of free services cannot succeed. There was no evidence of a separate agreement being reached with the JPPDs in this regard. I have already dismissed the allegation of wrongful trading.

380. I have found that the proposed assignment did not come to the board of SGL seeking the agreement of its directors. Mr Marsh and Mr Rowland, as directors of the Company, had already taken the decision in principle. Moreover, the assignment of the Company's asset was a question for the directors of the Company, though the sole owner of the Company (SGL) would doubtless be interested in what was intended. While SGL had power to stop the Assignment, the JPPDs did not. The JPPDs did not agree (actively) at the board meeting that the IP should be assigned to SAHL because they were not asked to do so. But they were passive and "failed" to raise any question or objection to the transfer.

381. I am not satisfied on the evidence that Mr Porter, Mr Harrison or Ms Sun did, at any time before 30 August 2017, share Mr Marsh's and Mr Rowland's objective of moving Adypt away from the reach of creditors of the Company. They were told (or knew, in Mr Porter's case) that this was a matter that had previously been approved by the board, and were told (and Mr Porter knew) that Bird & Bird had advised on it, and that it was "standard practice" or "best practice" or "administrative". I accept that something to this effect was said by Mr Rowland at the meeting, to give the impression that the Assignment was a routine matter. Mr Harrison's email to Mr Hubbard dated 4 November 2017 is in my view reliable evidence that, at the time of the Assignment, he regarded it as "something administrative" and did not realise its insolvency implications.

382. Although the JPPDs knew that the group was struggling to maintain sufficient cash, none of them was aware that, at the date of the August board meeting, the Company was insolvent. The person with the best understanding of that was Mr Rowland, who knew that his cash flow forecasts were "optimistic", to use his euphemism, and Mr Marsh no doubt knew whatever Mr Rowland knew, but the JPPDs did not know the financial position in the same detail. Mr Harrison, who was perhaps the most financially astute of the JPPDs, realised that the June 2017 cash flow forecast was "a bit optimistic", and that "a real cash flow crisis [was] coming down the line, but not short term". I do not therefore consider that Mr Porter, Mr Harrison or Ms Sun combined with the same objective, namely to put the Adypt software somewhere safe away from the Company's creditors. Mr Porter's acceptance that it was to be "isolated" was a reference, in my view, to its being held separately from the intending trading companies, SSL and SSEL, for commercial reasons, not separately from creditors of the Company.

383. In any event, given that they were not directors or shareholders of the Company, they were not in the same position as the majority shareholder and director in O'Connor LJ's example, i.e. one position in which they could stop the Assignment. Nor were they told anything about the terms of the proposed transfer, or about how the business of developing the IP would be carried out. While, together with Mr Hubbard (who was not present at the August board meeting), the JPPDs temporarily had a majority of directors on the board of SGL, they did not have control of the company in general meeting. Mr Marsh and Mr Rowland were therefore ultimately in a position to procure that SGL support their decision as directors of the Company to assign the IP to SAHL. That being so, mere passivity (failure to raise questions) in the face of something that they could not control should not, in my view, readily be treated as agreement by the JPPDs to an unlawful course being taken by the Company.

384. Had I found a sufficient combination with the JPPDs with the same objective of gifting the IP of the Company to SAHL, I would have found the requirement of injury to have been satisfied, on the basis that the JPPDs' company, SGL (of which they were directors and shareholders) would benefit by preserving the value of the IP, which was at the Company's expense: the benefit to one was inseparably linked with the loss to the other.

385. So far as SAHL is concerned, it was not incorporated until 25 August 2017, after the August 2017 board meeting of SGL. Its directors were Mr Marsh and Mr Rowland. It therefore could not have been party to a combination at the time of the board meeting.

386. It did nothing but execute the deeds of assignment with the Company and SSL on 30 August 2017, acting by its directors. The knowledge that it is deemed to have is therefore the knowledge of its two directors, who had the purpose of protecting the IP asset from potential claims. Accordingly, there was a combination of the Company and SAHL to transfer the IP gratuitously, with the intention of benefiting SAHL. This was necessarily at the expense of the Company, absent any declaration of trust, and so there was an intention to injure the Company.

387. The case of conspiracy to injure by unlawful means is therefore proved against Mr Marsh, Mr Rowland and SAHL.

<u>Dishonest assistance</u>

388. I have found that Mr Marsh and Mr Rowland were in breach of duties owed to the Company and its creditors by causing it to transfer its IP gratuitously to SAHL. For the reasons given in Section XI below, they were also in breach of duty by causing the Company to provide development services for the benefit of SAHL and SGL for free, using borrowed funds, after the Assignment. That means that, in relation to the dishonest assistance claim, the equivalent of breaches of trust by Mr Marsh and Mr Rowland by them are proved.

389. The basis of the case that the JPPDs dishonestly assisted the commission of those breaches of trust is pleaded as: (i) approving the Assignment; (ii) causing the Company to assign the IP to SAHL, and (iii) causing the Company to provide services to SAHL gratis.

390. The basis of the plea of dishonesty is that it is alleged that the JPPDs knew that the Company would be transferring a valuable asset and providing development services thereafter for no consideration, and that they knew that the Company was insolvent or bordering on insolvency. It is also alleged that they assisted the concealment of the Assignment from the Company's lawyers and auditors. On that basis ("therefore"), it is alleged that, by assisting and facilitating the breaches of trust, the JPPDs acted below the standards reasonably to be expected of an honest person.

391. In response, the JPPDs pleaded that they did not know the terms of the Assignment, or that the Company was bordering on insolvency, and that they had not acted beneath the standards reasonably to be expected of an honest person.

392. The issue of objective dishonesty was therefore expressly joined on the statements of case, as respects the JPPDs' actual knowledge and also the objective standard of their

conduct.

393. As to the legal requirement that a defendant has assisted a breach of trust, the defendant must assist in the sense that it has made the fiduciary's breach of duty easier than it would otherwise have been: Group Seven Ltd v Nasir [2019] EWCA Civ 614; [2020] Ch 129 at [110] ("*Nasir*"). It is not necessary to show that the assistance was causative of loss, only that the breach of trust caused loss: ibid.

394. Snowden J put the matter in this way in Bilta (UK) Ltd v Natwest Markets plc [2020] EWHC 546 (Ch) at [162]:

> "What is sufficient for the ingredient of 'assistance' is simply conduct which in fact assists the fiduciary to commit the act which constitutes the breach of trust or fiduciary duty: *Madoff Securities International v Raven* [2013] EWHC 3147 (Comm) ("Madoff") at [351]. Accordingly, if the defendant's conduct provides no assistance and does not enable the breach to be committed at all (*Brown v Bennett* [1999] BCC 525 at 533), or if it played no more than a minimal role in enabling the breach to be committed (*Brinks v Abu Saleh (No.3)* [1996] CLC 133 at 148-149), there will be no liability".

395. There is no reason in principle why a failure to act cannot assist the commission of a breach of trust, if the failure did in fact facilitate the breach to that more than minimal standard. However, for the assistance thereby rendered to be dishonest, the circumstances and knowledge of the defendant must be such as to require an honest person in their position with that knowledge to act. A failure to act may, however, more readily be explained by carelessness rather than dishonesty: Royal Brunei Airlines v Tan [1995] 2 AC 378 at 389, per Lord Nicholls of Birkenhead.

396. The test for dishonesty is that in Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67; [2018] AC 391 at [74] ("*Ivey*"):

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

397. For this purpose, blind-eye knowledge counts as knowledge. It has two elements. First, a suspicion that certain facts may exist. This is judged subjectively by reference to a defendant's beliefs. Second, a conscious decision to refrain from taking any step to confirm those facts: *Nasir* at [59].

Dishonest assistance by the JPPDs

398. The allegations of assistance against the JPPDs are essentially these.

i) First, at the August 2017 board meeting of SGL, the JPPDs (who were all present) agreed and approved the proposed assignment and the appointment of Mr Marsh as a director of the Company to implement the proposal. They asked no questions about the proposal.

ii) Second, following the Assignment and notice of it being given to the October 2017 board meeting of SGL, the JPPDs did nothing to try to reverse the position and allowed the Company to continue to provide free services to SAHL and SGL without remuneration or other consideration.

iii) Third, they helped to conceal the Assignment from the Company's solicitors and auditors.

iv) Fourth, Mr Porter in particular assisted the breach of duty by failing to disclose to the August 2017 meeting, or to the other directors of SGL thereafter, the news received by email on 22 August 2017 that LSEG had no current intention of contracting with Serisys for an Adypt licence.

399. I have already found that at the August 2017 board meeting there was no express agreement or approval, or request for agreement or approval, of the proposed assignment. I find that there were no questions asked about it either. The intention of the directors of the Company was reported and some explanation of the proposal was given. It was explained that Bird & Bird had advised on it, and that the transfer was "standard practice" or "best practice" or "administrative".

400. The inaction or "failure" of the JPPDs to ask questions, to require sight of the legal advice or to object in principle, probably did facilitate the breaches of duty by Mr Marsh and Mr Rowland on 30 August 2017. If the JPPDs had challenged the proposal, it might not have happened until the board of SGL as a whole was satisfied that it should. On inquiry, the board might not have been satisfied, and it is unclear whether, in those circumstances, Mr Marsh and Mr Rowland would still have proceeded with the Assignment, rather than (for example) the Company granting SSL a licence so that SSL could license BOCI or any other willing licensee.

401. As for the failure to object in or after October 2017, it is correct that the JPPDs were all made aware at the board meeting (only Mr Harrison attended it) or from the minutes (which Mr Porter and Ms Sun received soon afterwards) that the Assignment had been made, and that no attempt was made by any of them to question it, look at the deeds, or attempt to reverse the position. Nor did they raise any objection then to the continued operation of the Company, providing development services to SAHL as owner of Adypt, or to SGL.

402. However, the Assignment had happened by that time. In my judgment, nothing that might have been said in October 2017 or later would have made any difference, particularly as Mr Marsh and Mr Rowland would have been aware by then that the financial position of Serisys had worsened. The breach of trust relating to the Assignment had occurred on 30 August 2017 and was not assisted or facilitated by anything that was or not done in

October 2017. There was no realistic possibility of the Assignment being reversed, or varied so as to make SAHL liable to pay the full value of the assigned IP. SAHL did not have the necessary funds.

403. As for the alleged failure to draw the attention of the Company's solicitors and auditors to the Assignment, I am not persuaded that there was any responsibility on anyone to tell Bird & Bird that the Company had (belatedly) implemented the temporary tactical solution. The Company was not obliged to seek advice, though its directors would have been well advised to do so. As for the auditors, the JPPDs were non-executive directors, without any primary responsibility in that regard. It is not pleaded that they knew that Mr Marsh and Mr Rowland had not disclosed the Assignment to the auditors, nor was it suggested in cross-examination that they knew that fact. Even if they had known it, they would not have known of any failure on the part of the executive directors until the 2017 accounts were being prepared in 2018, far too late to have had any influence on the execution of the Assignment or the provision of services by the Company.

404. In relation to the provision of free development services, any objection by the JPPDs about the propriety of that arrangement (if they understood it) may have resulted in changes being made, such as the ongoing expenses of the Company's business being donated to the Company by SGL rather than lent to it. But this is speculative, and it was not explored in cross-examination with Mr Marsh or Mr Rowland. More likely, I find, is that it would have made no difference to what Mr Marsh and Mr Rowland had already decided to do, so far as the continued development of the software was concerned. The work was clearly to continue, funded by SGL. The money provided by SGL would probably still have been treated as a loan, regardless of any intervention by the JPPDs, because it improved the appearance in SGL's own financial statements, while making no material difference to the appearance of the Company's, owing to the existing huge deficit. The failure to object to the continuing work of the Company therefore did not assist the breaches of trust.

405. Mr Porter knew that that Mr Allen had emailed on the morning of the August board meeting to say that LSEG had no current proposal to use Adypt: he was one of the recipients of the email. He immediately sent a comment to Mr Marsh by email ("well timed"). Mr Marsh said that he did not receive either email because it was not his practice to read or send emails when chairing a meeting. I do not accept that evidence. He was shown in cross-examination other examples during other meetings when he had done exactly that. I find that Mr Marsh knew about Mr Allen's email during the board meeting, but did not draw it to the board's attention, deliberately. Mr Porter did not do so either. He said that he felt that it was a matter for Mr Marsh, and that he would have assumed (correctly) that Mr Marsh had seen the email from Mr Allen.

406. Mr Marsh attempted to explain why the email from Mr Allen was inconclusive but good news in the longer term. He was unpersuasive: the email was clearly a "no thank you" expressed in gentle terms. I find that both Mr Porter and Mr Marsh realised that it was a blow. The LSEG rejection email mattered because income of US$890,000 in the August 2017 cash flow forecast was attributed to a contract with LSEG. Without it, positive cash flow to January 2018 depended on raising US$3 million in September 2017 – which itself was unduly optimistic. In the event, only $500,000 was raised by the November 2017 rights issue.

407. If Mr Porter had raised the content of the Allen email, the board would have realised the extent to which the cash flow projections were falsified. They would have realised, if they had read the cash flow forecast carefully, that SGL was in a more difficult financial position than was being presented. Reference to LSEG's decision may have caused Mr Harrison or Ms Sun to question whether the proposed assignment really was just for administrative reasons. But this is too speculative, in my view. Mr Harrison said that when he did know about the Allen email, possibly in October or November 2017, he did not discuss it with other board members. Ms Sun was not asked about it, except to confirm that this meant that there would be no LSEG licence fees within 3 months. Neither was asked whether, if they had known about it at the August board meeting, they would have been more concerned about the proposed assignment and might have questioned it.

408. The fact that Mr Marsh did not draw the Allen email to the board's attention, either at the meeting or at any time afterwards for more than 2 months, and the misleading information given to shareholders about LSEG, shows that Mr Marsh was anxious that the board and investors did not know about it at the time. Understanding that the financial outlook was worse than was being presented by Mr Rowland would not of itself have made it more difficult for the Assignment to proceed. (It was after all proceeding because of Mr Marsh's and Mr Rowland's concern about the financial threat to the Company.) In my judgment, it is too speculative to conclude, in these circumstances, that disclosure of the Allen email to the board would have caused the Assignment to be questioned. Given the approach of each of Mr Porter, Mr Harrison and Ms Sun to that matter, I consider it most unlikely.

409. That means that the omissions of the JPPDs that assisted Mr Marsh's and Mr Rowland's breaches of duty were the failure of each of them to raise objection to the proposed assignment at the August 2017 board meeting, or shortly afterwards.

410. Whether those omissions were dishonest depends on what each Defendant individually knew (including blind-eye knowledge) and believed, and whether, on the basis of their own knowledge and beliefs, they were dishonest by the standards of an ordinary decent person. The question is therefore whether an ordinary decent person, knowing what each Defendant knew, would have asked questions about or objected to the Assignment in the board meeting or before 30 August 2017.

411. The knowledge alleged against all the JPPDs is as follows:

i) First, they knew from the August 2017 group management accounts that were in the board meeting pack that the Company was in serious financial difficulty;

ii) Second, they knew that the Adypt IP held by the Company was its only valuable asset and that Adypt as a whole was believed to have very substantial value;

iii) Third, they knew that it was intended that the Company would continue to provide development services for free;

iv) They knew (on a blind-eye basis) that no proper legal advice had been taken about the terms of any transfer of the IP, nor any valuation obtained.

412. The allegation against each of Mr Porter, Mr Harrison and Ms Sun, namely that they omitted to do something dishonestly, is a serious allegation against senior business people of reputation and of good character. The court will not draw an inference of dishonesty from facts that are equally consistent with carelessness or negligence, and it requires cogent evidence to displace the more natural assumption that defendants of good character have acted honestly rather than dishonestly. That does not alter the standard of proof, which is proof on the balance of probabilities, but the facts must be established by evidence that justifies the drawing of an inference of dishonesty.

413. A further protection for defendants accused of dishonesty is that the court traditionally requires allegations of dishonestly to be unambiguously and clearly pleaded, setting out the facts (in relation to each defendant) from which the inference of dishonesty is sought to be drawn, and requires the allegation of dishonesty to be clearly put to the defendant when giving evidence, so that they have an opportunity to explain or exonerate themselves. The clearest statement of this principle is the judgment of Briggs J in HMRC v Dempster [2008] EWHC 63 (Ch) on an appeal against a decision of the then London VAT Tribunal. At [25] and [26], in response to an argument that it was unnecessary to put to the taxpayer allegations that he had been involved in a fraud, the Judge says:

> "[Counsel] submitted that the whole thrust of her cross examination of Mr Dempster before the Tribunal had been directed to establishing that his account of the transactions was untrue, and that they were to his knowledge parts of an artificial pantomime rather than on genuine arm‟s length commercial terms. She submitted that since, by necessary implication (albeit not in express terms), HMRC's Statement of Case before the Tribunal had constituted a case of dishonesty, it was unnecessary for it to be put specifically in cross examination to Mr Dempster either that he was a knowing party to a VAT fraud, or that he knew, or turned a blind eye to the fact that, the software which he traded as an intermediary between Abacus and Spectrum was fake or worthless.
>
> I emphatically disagree with that submission. First, the Tribunal's summary of what was not put in cross examination is stated with clarity on no less than three occasions in the Decision and I was provided neither with a transcript, nor notes (whether by the Tribunal itself or by the parties) of the cross examination with which to be in any position to conclude that the Tribunal's summary of the cross examination was other than fair and accurate. Secondly, it is a cardinal principle of litigation that if serious allegations, in particular allegations of dishonesty are to be made against a party who is called as a witness they must be both fairly and squarely pleaded, and fairly and squarely put to that witness in cross examination. In my judgment the Tribunal's conclusion that it was constrained, notwithstanding suspicion, from making the necessary findings of knowledge against Mr Dempster (necessary that is to permit the consequences of the alleged sham to be visited upon him) was nothing more nor less than a correct and conventional application of that cardinal principle."

414. The JPPDs raised and persisted in objections to my proceeding to decide whether they were liable for dishonest assistance, first because, Mr Mills said, no relief was expressly claimed against them in the claim form or re-amended particulars of claim under this

cause of action, and secondly, because the allegation that they had been dishonest had not been put to them, in terms, in cross-examination. This was said to be essential so that each JPPD could understand that the allegation against them was being pursued (as distinct from allegations of breach of duty not involving dishonesty), and to give them a fair opportunity to answer it. Mr Smith supported the argument with reference to allegations that the THDs had not acted in good faith or honestly.

415. Mr Mills is right that the words "equitable compensation for dishonest assistance" are not found in the claim form or the prayer in relation to the JPPDs, only in relation to SAHL, but the allegations against the JPPDs are pleaded in detail in paras 42-44 of the statement of case, and the allegations about what they did and knew at the times of the August and October 2017 board meetings were explored in great detail in cross-examination, and have been addressed in closing submissions. Para 44 is, in substance if not form, a prayer for equitable compensation and an account from them. I would therefore unhesitatingly grant permission to GHSL to amend its claim form to add "the Third to Fifth Defendants and", in order to remedy this oversight.

416. The case advanced at trial strayed wider than the pleaded case, in that GHSL claimed that the JPPDs knew that Adypt as a whole was considered to have very substantial value, and knew (on a blind-eye basis) that no proper legal advice had been taken about the terms of any transfer of the IP, nor any valuation of AdyptUK or Adypt obtained.

417. It was not, in fact, put to any of the JPPDs, in terms, that they had been dishonest. What was explored with them at length was what they knew at the time about: (i) the true state of the Company's finances; (ii) the over-optimism of the SGL cash flows, and the reasons for that; (iii) the likelihood of the Company being insolvent; (iv) the value of the IP that the Company owned; (v) the terms of the Assignment; and (vi) the subsequent provision of services to SAHL by the Company for free. Mr Riley and Mr Mulderrig put to each of the JPPDs that they knew that the forecasts were hopelessly over-optimistic, that the Company was in serious financial trouble and at least on the verge of insolvency, such that a creditor duty arose (*Sequana*), and that very valuable IP was being given away for (in reality) nothing, leaving the Company with nothing of any value. It was also put that each of the JPPDs was aware or suspected that no legal advice on the Assignment had been obtained, and should have enquired about that.

418. Mr Riley submitted that the authorities that stress the importance of putting squarely to witnesses allegations that they were dishonest has to be viewed in the light of *Ivey*, now that it is not the case that a defendant has to know that what they were doing was dishonest or know that it would be regarded as dishonest by others. The test is an objective one, viz whether, on the basis of what the defendant knew or believed, it was dishonest by the standards of ordinary decent people. That is a question for the court. The defendant's own opinion or understanding of dishonesty is legally irrelevant. If legally irrelevant, Mr Riley said, the court should not require it to be suggested to the defendant that they were dishonest, as long as they understood that that was the allegation against them. What has to be put to a defendant in that position are the facts that it is alleged that they knew, or as to which they were suspicious and deliberately did not enquire further, and the action that they took or did not take, and what they should have done. He submitted that where, as here, dishonesty is expressly pleaded against a party to the claim, and that party addresses it in their defence and in their witness statement, there is no formal requirement to put the allegation of dishonesty, provided that the witness has had a fair and informed opportunity to answer the allegation.

419. Mr Mills responded to the effect that *Ivey* did not change the law but merely clarified the right approach, and that it remained a fundamental principle of these courts that a defendant, particularly if a person of good character, should not be found to have been dishonest without their having a fair opportunity to meet the allegation head on, and to say whatever they wish to say by way of explanation of their conduct. Mr Smith supported that argument.

420. I do not find it necessary to give detailed reasons for resolving this issue, or to refer to the many authorities that were cited to me, interesting though the point is. This judgment is long enough without that. My conclusion, shortly expressed, is that where it is clear from statements of case what is being alleged against a defendant, particularly a represented defendant, and the defendant has had full opportunity to understand the allegation, respond to it, and deny or explain, as appropriate, it is not necessary in order to achieve a fair trial, before the court can draw adverse inferences from the facts proved, to give the defendant express notice in cross-examination that it is being suggested that they were dishonest. See, in a slightly different context, which did not involve a claim based on dishonesty, the reasoning in MR (Pakistan) v Secretary of State for the Home Department [2026] EWCA Civ 473, per Snowden LJ at [91] to [96]. In a case where there has been no adequate opportunity, or there is doubt about the case advanced or whether the defendant has understood it, the position might be different. It is different in the case of a mere witness, as distinct from a defendant, if it is intended to suggest that the court should not accept the evidence of the witness because it is dishonestly given.

421. What is required is that the factual account given by the defendant in response to facts alleged by the claimant is challenged in cross-examination, if the claimant intends in closing submissions to suggest that the defendant's account of the facts is untrue. Thus, if it is alleged in the statement of case that the defendant knew certain facts giving rise to an inference of dishonesty, and the defendant in their witness statement or oral evidence disputes the facts, or disputes that they knew them, the claimant must challenge the defendant's different account. That is not the same as a requirement to put to a defendant that what they did was dishonest. It is not suggested in this case that GHSL did not adequately challenge the Defendants' factual case or sufficiently put its own factual case.

422. I reject Mr Mills' suggestion that the JPPDs were entitled to think, absent an express assertion of dishonesty, that the claim against them for dishonest assistance was being abandoned. Mr Mills suggested that, without that express assertion, the matters being challenged by Mr Riley and Mr Mulderrig were to be taken as relating to the case against the JPPDs in conspiracy to injure by unlawful means or breach of directors' duties, rather than dishonest assistance. No reason for them to think that was given, other than that the word "dishonest" was not used in cross-examination, which is a circular argument. In any event, the allegations of conspiracy to injure by unlawful means and breach of the s.172 duty are just as serious and, in the case of s.172, involve an allegation of lack of honest purpose (see Saxon Woods Investments Ltd v Costa [2026] UKSC 21).

423. In this case, I am satisfied in any event, in the case of each of the JPPDs, that they were not dishonest. That is because they probably did not know, or turn a blind eye to, facts that they needed to know in order to support an inference of dishonesty according to the applicable standard. These were, in particular, the proposed terms or accounting treatment of the Assignment, the prohibited purpose of Mr Marsh and Mr Rowland, and the fact that Mr Rowland had not obtained relevant legal advice.

424. The real difficulty with GHSL's case of dishonesty based on the knowledge of the JPPDs is that they did not, I find, know about the terms of the Assignment, see the executed deeds, know whether the accrued debt to SGL for the cost of developing the software would be left with the Company, or know about an arrangement (if there was one) for the Company to carry on developing Adypt for free. No detail was provided at the August or October 2017 board meetings. Nor in my judgment did any of them know or suspect that the Company was unable to pay its debts, as distinct from being part of a group that was financially challenged at the time (the intra-group debt being entirely a matter for SGL and unlikely to be enforced). Suspicion about the Company's solvency first came to Mr Harrison in early November 2017, following the HMRC threat of winding up and the inability to pay the Watford rent and staff at the end of October 2017. But that is too late.

425. Although each of the JPPDs could have discovered the individual position of the Company in August 2017 by scrutinising the management accounts and cash flow forecasts for the group, they did not do so. Mr Harrison had concerns about the cash flow forecast in June 2017 being too optimistic but asked for an up-to-date one, which was provided in the August 2017 board pack. He was not turning a blind eye. He was aware of a risk of a cash flow crisis for Serisys at a later time.

426. Each of the non-executive directors had little time for SGL's affairs, let alone the financial position of its subsidiaries individually. They were only concerned with the position of Serisys as a group. Each of them was able to give about a day per month to that part of their work, and Ms Sun significantly less than that during her serious illness in 2017. Mr Porter took no interest in the cash flow forecasts; Mr Harrison and Ms Sun took some interest, but their focus was on the opportunities rather than the accrued liabilities. None of them was appointed to perform the role of a traditional non-executive director and none of them did so.

427. The JPPDs all knew that, to succeed, SGL needed to sell some licences and needed significant investment to keep it going, but their focus was on those matters. Mr Marsh had control of the marketing, to Mr Harrison's frustration, and there was only limited input that he could have there. Mr Porter had been involved in attempts to interest LCH, LSEG and DB in licences, but not much else. Ms Sun was involved in attempts to persuade smaller Asian firms to invest capital.

428. The truth is that in August 2017 none of them, despite being small investors in SGL, were scrutinising the board papers for the state of solvency of one of the subsidiaries. Ms Sun did make some enquiries about loan debt at the end of August 2017 before herself lending SGL $100,000, but that was to protect her own interests. As at August 2017, none of Mr Porter, Mr Harrison and Ms Sun suspected that the Company was insolvent or bordering on insolvent. In my judgment, they did not abstain from looking further or asking questions because they suspected the truth: they were only focused on the bigger picture as it related to their particular roles. That is why it came as such a shock to Mr Harrison and Ms Sun when, for the first time, it appeared on 31 October 2017 that the Company could not find £4,100 odd to pay its monthly rent.

429. Accordingly, I reject the case that each of Mr Porter, Mr Harrison and Ms Sun knew by the end of August 2017 that the Company was unable to pay its debts and so was insolvent. I also reject the case that they knew that the Assignment was for no consideration and that it was intended that the Company would continue to work for free,

for SAHL's benefit. They were unaware that this was intended. It would have been avoided if SGL had gifted the further development funds to the Company rather than treating them as loans.

430. The case based on knowledge of previous legal advice (in Mr Porter's case) or knowledge or suspicion of the absence of legal advice on the Assignment (in Mr Harrison's and Ms Sun's case) and absence of a valuation is not one that GHSL can properly pursue, as it was not pleaded – there was no allegation of dishonesty in relation to the failure to obtain or request sight of legal advice or a valuation of AdyptUK. All that is pleaded (in the section dealing with unlawful means conspiracy) is that the JPPDs knew the unlawful nature of the proposed assignment and the harm that would result to the Company. While the extent of Mr Porter's knowledge of the 2016 legal advice and Bird & Bird's fee estimate for a temporary tactical solution was explored with him, as was the absence of sight of legal advice in the cases of all the JPPDs, it was not suggested to any of them that they had deliberately abstained from asking to see the legal advice or asking for a valuation because they suspected that what was happening was unlawful, or that they had otherwise fallen short of the standards of honesty by not inquiring further. That does make it unfair for GHSL now to rely on dishonesty in those respects.

431. In relation to the allegation that Mr Porter knew that any intra-group IP transfer required proper structuring, including transfer pricing, I do not consider that Mr Porter knew or suspected that, when the August 2017 board meeting took place. Nor was it suggested in terms that he did. He regarded it as an administrative transfer from one wholly-owned entity to another. The fact that documents included in a board meeting documents pack in January 2016 had included information about tax structuring and transfer pricing would not have been on his mind in August 2017, not least because SGL had decided at the January 2016 board meeting not to go down that route for the time being. All that Mr Porter could remember is that the board did approve the temporary tactical solution instead, which required only the drafting of some transfer documents and the creation of a new subsidiary company, and that Bird & Bird were going to be involved in that. The proposed assignment in August 2017 was plainly not the full tax structuring: it was giving effect to the temporary tactical solution.

432. I find that each of the JPPDs knew that Mr Marsh believed that Adypt could be worth US$100 million, and they all believed that Adypt could have very substantial value. I do not believe the assertion of each of them that AdyptUK had no value at the time, but equally I do not consider that the value of AdyptUK independently was something that any of the JPPDs considered, beyond assuming that it was a valuable part of Adypt. As this trial has demonstrated, the value of AdyptUK turns on copyright and valuation issues, on which the JPPDs had no expertise.

433. I find that none of the JPPDs knew or suspected in August 2017 that there was an issue with the lawfulness of the transfer of the IP within the group structure. Mr Porter and Ms Sun knew nothing about such matters, and Mr Harrison did not realise the possible implications of the transfer until November 2017, when he knew about the financial crisis and agreed with Mr Hubbard that the movement of Adypt IP, as recorded in the October 2017 board minutes, "does smell bad".

434. I reject Mr Harrison's attempt to explain this away as something that might imperil a possible restructuring of SGL. It is clearly a belated recognition, in the light of the cash flow crisis at the end of October 2017, that a transfer of the IP to a newly established

company would look suspicious, given the apparent inability of the Company to pay its debts. Nevertheless, it is knowledge that he had in November 2017, not August 2017. For reasons that I have already given, raising questions about the validity of the Assignment at the December 2017 board meeting would not have made any difference to the Assignment, which would not have been undone by Mr Marsh and Mr Rowland. Neither would it have made a difference to the provision of services by the Company.

435. Whether each of the JPPDs was doing a good job as a non-executive director of SGL is a different question from whether they knew or turned a blind eye to facts that made it dishonest to acquiesce in the proposed Assignment

Dishonest assistance by SAHL

436. There is also a case in dishonest assistance pleaded and pursued against SAHL. It knew, through its directors, Mr Marsh and Mr Rowland, that the Company was unable to pay its debts, that there was no consideration of any value for the Assignment, and that the Company would (and did) continue to provide its services for free. It is pleaded that by participating in the Assignment on those terms, SAHL assisted the breaches of trust in a way that fell below the standards reasonably to be expected of an honest person.

437. The execution by SAHL of the deed by which the Company's IP was assigned to it in return for a one-year licence to use Adypt clearly assisted the breaches of duty by Mr Marsh and Mr Rowland. The guilty knowledge of Mr Marsh and Mr Rowland is SAHL's knowledge for this purpose.

438. Mr Smith argued only that the Assignment was no breach of duty. Once that argument is rejected, as I have done, and a breach of duty under s.172 is established, there is no answer to the claim of dishonest assistance by SAHL entering into the Assignment.

439. As regards the continued provision of gratuitous services, the position is less clear. The services were provided by the Company because its directors continued the employment of its staff and they continued their work. SGL provided funds that were just about sufficient to pay what had to be paid to keep the operation afloat. But SAHL itself did nothing further, other than hold the Adypt IP and receive involuntarily the benefit of work done on it. Nor was it pleaded that by failing to do something, SAHL was assisting the commission of breaches of duty by Mr Marsh and Mr Rowland as directors of the Company. What happened was entirely a matter between the Company and SGL.

440. Accordingly, SAHL is not liable for dishonest assistance of breaches of duty in relation to the continued provision of services by the Company after 30 August 2017.

XI. Breaches of duty by the Company's directors

441. The breaches of duty alleged are of:

i) the duty to act in the way that the director considers, in good faith, is most likely to promote the success of the company for the benefit of its members as a whole (s.172 CA 2006);

ii) the duty to act with the care, skill and diligence reasonably to be expected of a director in the position of the Defendants, or (if higher) to be expected of the Defendants (s.174 CA 2006);

iii) the duty to avoid situations in which the director's interest conflicts, or may conflict, with the interests of the company (s.175 CA 2006);

iv) the duty to declare the nature and extent of the director's personal interest in a proposed transaction or arrangement with the company, unless the interest cannot reasonably be regarded as giving rise to a conflict (s.177 CA 2006).

442. I have already made the findings that explain why Mr Marsh and Mr Rowland were in breach of the s.172 duty, which they owed to the creditors of the Company at the time of the Assignment and at all times subsequently because the Company was insolvent. This duty includes a duty to consider and not harm the interests of the creditors: BTI 2014 Ltd v Sequana SA [2022] UKSC 25 ("Sequana") at [176]-[177] and [288]. The directors at no time considered the interests of the creditors of the Company, other than SGL; objectively, they should have done, and so are in breach for that reason. The failure to consider the interests of creditors was essentially admitted by Mr Marsh and Mr Rowland, but in any case I find it to be so. No valuation of AdyptUK was obtained, nor legal advice as to the propriety of the proposed assignment. Nor was any attempt made to identify how the creditors would be paid if the Company continued to trade in the belief that commercial success was still achievable.

443. Continuing to incur further liabilities to creditors, by causing the Company to work gratuitously for the benefit of SAHL and SGL, was similarly a breach of the duty that was owed to the creditors: it caused the Company's liabilities to increase over a 19-month period. Objectively, continuation of trading was only justifiable if the further expenses of doing so were fully funded and there was a plan to pay existing creditors.

444. An honest person in Mr Marsh's and Mr Rowland's position in August 2017 could not reasonably have believed that the Assignment for no value was in the best interests of the creditors of the Company and would not harm them, given its insolvency. The directors assigned the IP to SAHL to protect it from claims of creditors in a possible winding up or administration of the Company. By the standards of ordinary decent people, such a transfer was dishonest.

445. For completeness, SGL, as sole member of the Company, did not authorise the transfer of the IP in August 2017. It was not asked to, as all present at the board meeting confirmed. SGL simply "noted" the intention of the Company to assign its IP, as recorded in the minutes. Even if it had done so, it was the interests of the creditors generally that the Company's directors had to consider at that time, and the sole member of the Company could not authorise a breach of that duty: *Sequana* at [91].

446. Turning to the duty of care, skill and diligence, the applicable standard is one of negligence, i.e. a requirement of reasonable care to avoid causing harm, and the question to be asked is whether the decision in question falls outside the range of decisions reasonably available to a director, and is more than merely an error of judgement: Dynamo Recoveries Ltd v Nix [2024] EWHC 3116 (Comm); [2026] 1 BCLC 213 at [95], [96], per Dame Clare Moulder DBE, citing the judgment of Trower J in Clientearth v Shell plc [2023] EWHC 1897 (Ch) at [31], [32].

447. The decisions of Mr Marsh and Mr Rowland to assign away AdyptUK for no consideration of any value to the Company, and to cause the Company to continue to develop the software IP for the benefit of SAHL and SGL for free, were clearly a failure of due care and outside the range of reasonable decisions open to them. The issue of the solvency of the Company was not addressed, nor was legal advice taken or AdyptUK valued, nor was any proposal to fund the Company considered.

448. Although the Assignment was not done in order to minimise tax liability on receipts from licensing Adypt, transfer pricing was an issue that would arise if the Company was transferring its ownership of valuable IP to a company in a low tax jurisdiction. Both Mr Marsh and Mr Rowland were aware that Bird & Bird had drawn attention to the need for this to be considered carefully when deciding the tax strategy for Serisys. In any event, the circumstances in August 2017 were different from those in January 2016, when Bird & Bird had given preliminary advice about the work that would be required: the Company was unable to pay its debts in August 2017.

449. Mr Marsh and Mr Rowland continued to cause the Company to borrow money to fund the development of SAHL's IP at a time when it was insolvent, even after warnings from Mr Hubbard and others about the insolvency of the Company and wrongful trading. This too was, in my judgment, a breach of the duty of care that Mr Marsh and Mr Rowland owed the Company. Mr Smith argued that there was no breach because the continued development of Adypt was necessary, if Serisys was to secure commercial licences and obtain further substantial investment, and that this was accordingly a reasonable decision for the directors to take. While it was reasonable to use the Company's skills to continue to develop the software, it was not reasonable to exploit its resources for the benefit of SGL at the expense of its creditors.

450. Once again, SGL was not asked to approve, nor did it approve, the provision of free services to SAHL. Its directors were not told what the terms of the Assignment were, or what was planned in terms of the future work of the employees of the Company, though doubtless they assumed that the employees would continue to work, as required.

451. As for the duty to avoid a situation of conflict of interest and duty, I agree with Mr Smith that there was no such conflict in this case. Mr Marsh's and Mr Rowland's interests were as shareholders of and investors in SGL, and SGL was the sole member of the Company. The distinction between the Company's interests and SGL's interests only arose because of the insolvency of the Company. A director with shares in a company is not required to avoid a conflict with creditors other than by taking their interests into account, once the duty to do so arises, and then avoiding harming those interests. There was therefore no separate breach of the s.175 duty.

452. Mr Marsh and Mr Rowland were not required to declare their interest as shareholders or investors in the Company's only member prior to the resolution of the board of the Company on 30 August 2017 to effect the Assignment: they were the only directors of the Company and each knew of the other's interest. SGL did not enter into a transaction or arrangement with the Company, only SAHL did, and so no disclosure was required at the SGL board meeting on 22 August 2017. In any event, as a director of SGL, Mr Marsh and Mr Rowland did not have a conflicting interest. Even if they did, their shareholdings and investment in SGL were known to all the directors of SGL.

453. The claims based on breaches of the s.175 and s.177 duties are therefore rejected, but the claims based on s.172 and s.174 succeed.

454. Mr Marsh and Mr Rowland seek relief against the findings of breach of duty under s.1157(1) of the 2006 Act. This provides:

> "If in proceedings for negligence, default, breach of duty or breach of trust against—
> (a) an officer of a company, or
> (b) a person employed by a company as auditor (whether he is or is not an officer of the company),
> it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit."

455. Mr Smith submitted that Mr Marsh and Mr Rowland should be relieved on the basis that they were acting honestly and reasonably in taking the only course that would enable the Company to flourish and obtain long term funding. This was to do what was needed to enable Serisys to enter into licence agreements, which would unlock income and investment, and that Mr Marsh and Mr Rowland believed that consolidating the IP was a necessary pre-requisite to this.

456. I have already held that, while being ready to grant a licence to BOCI was a reason for considering an assignment by the Company, the main reason was to protect the IP against the possible consequences of the Company's insolvency. That is really the end of the matter for s.1157 purposes. Mr Marsh and Mr Rowland considered that it was desirable to have all the IP held by a clean, new subsidiary, to protect it from adverse claims.

457. Further, while it was true that the Company's long term interests would be served by Serisys granting licences, the assignment of AdyptUK was not necessary to achieve that at all, much less an assignment for no value. If it was only a matter of Serisys being ready to grant a licence by SSL to BOCI or another Asian bank or broker, the Company could have granted SSL a licence for AdyptUK, together with the necessary rights to license it to third parties. That would have enabled SSL to be the sole licensor (thereby dealing with any licensee's concern that it had more than one grantor of the IP) but it would not have sheltered SSL's IP from a potential claim by a licensee or its creditors. SSL therefore assigned its IP to SAHL too.

458. That demonstrates that the purpose was not to tap into an income stream, releasing investment, as Mr Smith submitted, but to safeguard the asset. That was not an honest and reasonable course for the directors of the Company to take at a time when it was insolvent.

XII. The 2019 and 2026 Charges over Adypt

459. The charges granted to Ms Ball by SAHL in 2019 and 2026 raise a number of discrete issues, namely:

i) Whether the 2019 charge was executed on the date that it bears or was backdated to try to distance the grant of security over Adypt from the winding up of the Company;

ii) Whether the 2019 charge was a TUV and a TDC;

iii) Whether the 2026 charge was a TUV and a TDC;

iv) Whether the 2026 charge is an impediment to the grant of relief to GHSL for the Assignment TUV and TDC.

<u>The relevant facts and the documents</u>

460. Ms Ball lent SGL US$500,000 on June 2016 to avert its then cash crisis. The terms were: a term of 3 months, at an interest rate of 1% per month, with security to be given over SGL's interest in Adypt, including the copyright, design right and trade marks.

461. At the same time as the LSA 2016 was made, Ms Ball and SGL entered into an Intellectual Property Security Agreement ("IPSA 2016"). Under the IPSA 2016, SGL granted Ms Ball a security interest over the intellectual property in Adypt as collateral security for the performance of SGL's obligations under the LSA 2016. The IPSA 2016 included an obligation on SGL not to transfer or otherwise encumber any interest in the charged IP except for licences granted in the ordinary course of its business, but did not include a covenant for further assurance.

462. That is material because, as is common ground, SGL had at the time no right, title or interest in Adypt other than its shares in the Company, SSL and SSTL. The purported charge was therefore ineffective to grant rights over Adypt, but no one seemed to realise that at the time. It was not realised until March 2019 or thereabouts, as I shall explain further. In addition, the IPSA 2016 was not duly registered against the name of SGL at Companies Registry in Hong Kong, as Hong Kong companies legislation requires, and it was therefore void as against the creditors of SGL in any event.

463. The $500,000 that was lent to SGL was used up in its ordinary course of business: the London and Hong Kong offices were costing SGL about US$350,000 per month at that time. The advance was therefore used up well before SAHL was incorporated, and it received no part of the benefit from the loan.

464. The repayment date for the loan was formally extended from time to time, by a series of variation agreements which substituted new repayment dates, and the interest was not paid by SGL. The unpaid interest was used to fund shares issued to Ms Ball in rights issues in November 2017 and February 2018. A further year's outstanding interest was then rolled up in a new extended loan that was documented in March 2019, after HMRC had presented a petition to wind up the Company on 6 February 2019 that was listed to be heard on 27 March 2019.

465. The new loan agreement bears a date of 1 March 2019 ("LSA 2019") but was stamped by the Hong Kong Stamp Office and registered at Companies Registry on 27 March 2019. Its terms are a loan of $560,000 for 6 weeks at an interest rate of 1% per month. The additional $60,000 was a year's accrued interest: no new funds were advanced in 2019.

466. Two further agreements with Ms Ball are also dated 1 March 2019: an Intellectual Property Security Termination Agreement, which purports to terminate the IPSA 2016; and a new security agreement ("IPSA 2019"), made this time between Ms Ball, SGL and SAHL by which SAHL charged all its right, title and interest in, to and under Adypt to Ms Ball as security for performance by SGL under LSA 2019. IPSA 2019 was also stamped and registered on 27 March 2019.

467. Ms Ball said that she was happy to support SGL until Adypt had taken off and that she had no intention to call in her loan.

468. In March 2019, Mr Rowland sought legal advice about the Company from Bird & Bird in London. It is clear from emails that allowing the Company to be wound up and organising a pre-pack administration were being considered, as was the possibility of paying the petition debt over an (agreed) extended period. However, payment over an extended period would require guarantees to be provided by the directors, which was unattractive.

469. Mr Marsh accepted that the Assignment was discussed with Bird & Bird, in particular the risk of its being vulnerable to an administrator or liquidator of the Company seeking to reclaim the Adypt IP formerly owned by the Company.

470. On 19 March 2019, Mr Rowland emailed Bird & Bird attaching various documents, including the Assignment, the LSA 2016 and the IPSA 2016, and a pdf of a variation agreement of IPSA 2016 dated 30 August 2017, which Mr Rowland described as "grants approval by Pamela for the assignment from [the Company], SSL and SSTL to SAHL that occurred on 30 Aug 2017" ("the 2017 Variation Agreement"). Mr Rowland asserted "Given the above, [the Company] has no IP", and suggested that SGL would like to implement a pre-pack administration because it was unlikely that it would be able to pay in time.

471. The 2017 Variation Agreement recites the IPSA 2016 "granting a security interest in the software ADYPT to the Lender" and that the grantor, SGL, owns the intellectual property collateral through its ownership of the Company, SSL and SSTL, that assignments to SAHL had been directed by SGL and that "such assignments are not allowed by virtue of clause 2b) of the IPSA". The IPSA 2016 was then varied to permit the assignment of the intellectual property collateral from SSL, the Company and SSTL to SAHL.

472. This document is revealing because it shows that, when it was signed, the parties considered that the IPSA 2016 was effective in granting (indirectly) security over Adypt and prevented SGL from assigning the IP to SAHL. The question in issue at the trial was whether this document was a forgery, because it was created in March 2019 and deliberately backdated to August 2017, prior to being sent to Bird & Bird to help to demonstrate that the IP had been validly assigned to SAHL and did not reside with the Company, or whether it was genuinely created in August 2017 to enable the IP to be validly assigned to SAHL.

473. The curiosity about the LSA 2019 and IPSA 2019, which conferred effective security over Adypt for the first time, being registered on the very day that the Company was compulsorily wound up is deepened by a series of strange messages passing between (variously) Mr Rowland, Mr Wong, Mr Marsh and Ms Ball in March 2019. These include some of the very few WhatsApp messages that were disclosed by the THDs.

i) On 25 March 2019, Mr Marsh messaged Mr Rowland at 4.39 pm stating: "Pamela [Ball] is ready to sign the new LSA. Her markup is below ….". A Word .docx file attachment was sent at 4.40pm with a message suggesting an amendment in the IPSA and asking Mr Rowland to co-ordinate with Ms Ball for signing. Mr Rowland responded "Will do. Witness?", to which Mr Marsh replied: "William [Wong] is OK by me because he will need to confirm the loan balance and he needs to know about the legal charge on SAHL".

ii) On the same day, Mr Marsh messaged Mr Rowland at 4.46 pm saying: "Please delete the two email trails LSA/IPSA and IPSA Termination. I will. Thank you.", to which Mr Rowland replied "Ok", and then 2 minutes later: "Done".

iii) A message later the same day from Mr Marsh says that SGL had the option to pay £300,000 to HMRC and Bird & Bird's fees, or £20,000 to Bird and Bird for the pre-pack upfront fee, and that he had instructed Bird and Bird to proceed with the pre-pack.

iv) On 26 March 2019, the day before the winding up petition was due to be heard, Mr Rowland messaged Mr Marsh: "Agreements signed and witnessed. Reg tmrw, need to discuss the form". Mr Marsh replied enquiring about the term of Ms Ball's new loan, to which Mr Rowland responded: "I made '6 wks' so not to look weird registering a day before maturity". "I agree" was the immediate response from Mr Marsh.

v) On the same day, Mr Wong emailed Ms Ball explaining that the balance of her secured loan to SGL as at 1 March 2019 was US$560,000, explaining how that was calculated.

vi) Shortly after that, Mr Rowland emailed Mr Marsh, headed "SAHL floating charge", saying "Please review the attached which is based on the guidance notes. I believe section 4 (note 16) means we leave blank on the assumption the previous charge was not registered and so didn't exist". Mr Marsh's response was "Nick, please submit immediately". This appears to be a reference to submitting appropriate registration documents to Companies Registry.

474. At about the same time as the exchange on 26 March 2019 about signing and witnessing agreements, Mr Shovell emailed Mr Marsh, copied to Mr Rowland, intimating that he had been told that the directors of the Company had "removed" the Adypt IP from the Company, and pointing out that a liquidator may be able to set aside that transaction and seize and sell Adypt in order to pay creditors.

475. Shortly afterwards, still on the same day (26 March) there is an email from a Stephen Silman to Mr Marsh, with a subject of "Insolvency Act 1986", which refers to sections 240 and 123 of the 1986 Act, and states:

> "Company deemed to be insolvent where transfer to connected person but presumption is rebuttable if we can show co was able to pay its debts at time of transfer."

Mr Marsh forwarded this to Mr Rowland, commenting:

> "Good news. The assignment is valid provided we can show that [the Company] was solvent at the time of the assignment i.e. 30 August 2017 … Please confirm with B&B".

Mr Silman was described by Mr Marsh as a former barrister. He was a shareholder of SGL who had invested large sums in late 2017 and 2018, and who became a director in April 2019.

476. The next day, Mr Rowland did email lawyers at Bird & Bird, asking for confirmation that the assignment agreements would not be caught by the 1986 Act "because Serisys Limited was not insolvent until now". The answer said "We cannot say that unfortunately" and explained why, and the risk of a TUV. Revealingly, Bird & Bird added the comment: "I cannot comment on value other than I imagine it is clear that the IP itself is more valuable than a non-exclusive licence?"

477. Mr Marsh forwarded this to Mr Silman who replied: "Question of fact but may be difficult to ascribe much value to the one year licence". Mr Marsh replied: "So, B&B are correct."

478. It was ultimately not disputed by Mr Rowland or Ms Ball, in the light of this evidence, that the 2019 loan agreement and IPSA 2019 were signed on or about 26 March 2019. Ms Ball could not recall when exactly she signed it, but confirmed that she asked Mr Wong to check the amount of her debt before she signed it. That email exchange is on 26 March 2019. Mr Rowland accepted that it was on 26 March 2019, when presented with the documentary evidence summarised above.

479. These steps were clearly taken in contemplation of the imminent administration or liquidation of the Company on 27 March 2019, not because Ms Ball's loan term had expired (which it had on 19 March 2018) or because she was pressing for repayment (which she confirmed in evidence she was not). The date of 1 March 2019 on the new loan agreement and on the IPSA 2019 was falsely used to give the impression that these agreements were remoter in time from the administration or liquidation than they in fact were, and the term of the loan was changed to six weeks (which Ms Ball could not otherwise explain) rather than (presumably) 4 weeks in order for registration of a secured loan one day before it was due to expire arousing suspicion.

480. Mr Rowland admitted, faced with the WhatsApps, that he wanted to avoid unnecessary questions from Companies Registry. That is partly true: he did not want there to be any delay in registration, so that the IPSA 2019 was registered before the liquidation of the Company. That is because Mr Rowland considered that registration of a charge granted by SAHL prior to the liquidation of the Company could, in some way, be an obstacle to a liquidator of the Company recovering the Adypt IP. As he put it, the concern at the time was with whether the liquidator could unwind the Assignment. Asked why the IPSA 2019 and the new loan agreement were dated 1 March 2019, he said that it made the

financial calculations more straightforward. I reject that explanation as being untrue. It was not a concern that had previously been adopted in documenting loans.

481. The inference to be drawn is an obvious one: the grant of security over SAHL's IP, apparently justified by a loan of US$560,000, was done in a rush immediately before the winding up in order to try to give Ms Ball effective security over Adypt (for the first time) that would prevent any creditors (through the liquidator) having access to that property.

482. The inference is supported by evidence that the 2017 Variation Agreement (dated 30 August 2017) was not in fact produced and executed then, but in March 2019. Following disclosure of this document and other documents by the THDs, GHSL served notice on the THDs that it did not admit its authenticity and required the THDs to prove it. GHSL has itself carried out a painstaking analysis of the metadata on various documents attached to emails in March 2019 to prove that the document was created in March 2019:

i) The signed document relied on and bearing the date 30 August 2017 is a 3-page document signed by Ms Ball and Mr Rowland on behalf of all Serisys companies and witnessed in all cases by Mr Wong.

ii) By a WhatsApp timed at 09:18 (GMT) on 15 March 2019, Mr Rowland sent Mr Wong a Word file named "Variation Agreement to Intellectual Property Security Agreement 30 Aug 2017-2.docx".

iii) Some hours earlier, at 10:48 (Hong Kong time) a standalone .docx file called Variation Agreement to Intellectual Property S.docx was created by "Tim". This is an unsigned version more expansively laid out over 4 pages.

iv) Just over an hour later (12:06 Hong Kong time), a different, unsigned draft of the same document, but in more compressed form on 3 pages, was created by "Tim" and saved with the longer file name set out in ii) above.

v) 4 minutes later, Mr Rowland emailed the document with that longer title (among other electronic documents) to himself, or created a draft email with those documents attached, under the heading "trfr", which Mr Rowland confirmed was short for "transfer".

vi) Just over 5 hours later, at 17:16 (Hong Kong time), a scanned document, with signatures, was sent to Mr Wong in pdf format. This was a scan of the signed version of the document, on which the THDs rely.

483. Asked to explain what was happening, Mr Rowland first asserted that the document that he sent to Mr Wong was unsigned and that Serisys had mislaid the signed version of the 2017 Variation Agreement, so he was asking Mr Wong to find it and sent him the unsigned version of the same document. Mr Rowland was then shown that the document that was scanned and sent was a signed version, to which he commented: "Yes, it looks like he managed to find the original and scanned it", and asserted that it was the original 2017 version that had been found, not a document newly signed in 2019 that was scanned.

484. I reject Mr Rowland's explanation. The document that was signed is in the same format as a draft that was only created in that format for the first time on 15 March 2019 by Tim. The scanned version was sent to Mr Wong at the same time as (2 minutes before) the unsigned draft in the same format was sent by email. There is no credible reason why Mr Rowland would have sent Mr Wong an unsigned draft created earlier the same day if Mr Wong or Mr Rowland had recently discovered the authentic signed 2017 version. It would be the most remarkable coincidence if Mr Rowland had sent the draft to assist Mr Wong's search 2 minutes after Mr Wong had found the original and scanned and sent it to himself.

485. I did not find Mr Rowland's evidence on this issue credible. I consider that he was saying whatever served to explain that the original 2017 document was made on the date that it bears. However, the draft of that document was first prepared in 2019. No 2017 draft, or email exchange relating to it, was disclosed. There was no mention of, or reference to, a variation of the IPSA 2016 when the board of SGL was having the proposed assignment explained to it in 2017, as there surely would have been if that was part of what was planned. Nor was the board told about any such variation agreement subsequently. Further, if Mr Rowland had scrutinised the IPSA 2016 sufficiently in August 2017 to realise that Ms Ball's consent to the transfer of the IP was needed, I consider that he would also have realised that security from the company that owned the IP was needed, or that the IPSA 2016 had not been registered.

486. I therefore conclude that the THDs have failed to prove the authenticity of the Variation Agreement dated 30 August 2017, and find that it was brought into existence and signed in March 2019 in order to remove a possible basis of challenge to the lawfulness of the Assignment.

487. The LSA 2019 and the IPSA 2019 remained in place until February 2026, 3 months before the start of the trial. Then, on 26 February 2026, Ms Ball agreed to release and discharge SAHL from all security or obligations created by IPSA 2019. It is not disputed that this agreement was effective to discharge all her rights under IPSA 2019 and to release SAHL.

488. On the same day, Ms Ball, SGL and SAHL entered into a new IPSA ("IPSA 2026") and a Supplemental Loan and Security Agreement ("2026 loan agreement"). By the 2026 loan agreement, the parties agreed to extend the term of the LSA 2019 to 26 February 2027, subject to the condition that Ms Ball received the executed IPSA 2026 granting a first priority security interest over the IP collateral. The IPSA 2026 is stated to replace IPSA 2019 and grants a charge over the IP collateral in the same terms as IPSA 2019.

489. The explanation of Ms Ball for this strange transaction in the lead up to the trial was that it was intended to make her position as a secured lender to SGL "watertight", because the trial was coming up, so that there was "no reason to doubt that I had Adypt". She added that somebody had said that there may be a 7-year limit on this kind of security agreement in Hong Kong, and that the IPSA 2019 might be "out of date". Mr Rowland confirmed that there was no legal advice taken prior to entering into these agreements, and confirmed Ms Ball's evidence that there was a concern about the IPSA 2019 being too old to be effective. He also confirmed that it was entered into at the suggestion of Mr Marsh, who confirmed that it was to protect the position of his wife as creditor of SGL. Ms Ball is a substantial creditor of SGL, so it is understandable that Mr Marsh should wish to seek to protect his wife's position.

490. However, the true reason for the 2026 loan agreement and IPSA 2026 was the judgment of HHJ Cadwallader, sitting as a Judge of the High Court, given on 18 February 2026. Judge Cadwallader had heard an application by the THDs for summary judgment on GHSL's claim against them. The THD argued, among other things, that the IPSA 2019 was a bar to the grant of the relief that GHSL sought, namely setting aside the Assignment to SAHL, because third party rights had intervened. The Judge held that it was arguable in law that that was not the case, owing to the terms of s.241(2) of the 1986 Act. For this purpose, it is presumed that the person in question did not acquire the property in good faith if they knew about the surrounding circumstances and the relevant proceedings, or if they were connected with or an associate of either party to the TUV.

491. The THDs therefore became aware on 18 February 2026, if not before, that despite their concerted efforts in March 2019, the IPSA 2019 might not be a bar to the remedies claimed by GHSL. Judge Cadwallader's judgment said nothing about any time bar on enforcement of rights under IPSA 2019, nor did GHSL raise any such point. Quite why Mr Rowland thought that a new charge granted in 2026 would make a difference is unclear (the THDs were acting in person at the time). But at all events, the THDs entered into IPSA 2026 in order to try to improve their (or at least Ms Ball's) position in resisting GHSL's claim.

<u>Was the 2019 charge a TUV and a TDC?</u>

492. In one sense, this question is academic, because IPSA 2019 has been discharged. However, it is part of the necessary background to understanding the purpose and effect of IPSA 2026.

493. Whether the two charges granted by SAHL to Ms Ball were TUVs is relevant to the remedy that it is appropriate to grant, having determined that the Assignment was a TUV, and relevant to the question of whether that remedy can affect the property of another person under s.241(2). The Court is not exercising insolvency jurisdiction over SAHL, indeed SAHL has not been wound up.

494. IPSA 2019 was entered into on 26 March 2019, as I have explained. Prior to then, Ms Ball had no effective security over the IP held by the Company and SAHL. At the same time as the charge was granted by the IPSA 2019, and as part of the same transaction, SGL was effectively granted a further 2 weeks and 2 days before repayment of Ms Ball's loan was due. Although Ms Ball had no intention at the time of demanding repayment, consideration did move from her because she gave up a right to demand repayment for that short period. However, only SGL benefited from that. SGL was the borrower and the only person liable to repay. SAHL did not benefit: it granted Ms Ball a valuable right, namely a right to appropriate its property to repayment of SGL's debt.

495. The consideration moving from SAHL under IPSA 2019, which diminished the value of its asset because thereafter it had to pay (or procure that someone else paid) Ms Ball's debt in order to redeem the IP, was therefore matched by no consideration in money's worth receivable by SAHL. Although SAHL was also a party to the LSA 2019, it received no benefit under that agreement either. The IPSA 2019 was therefore a TUV under the terms of s.423(1) of the 1986 Act.

496. Whether it was also a TDC depends on whether SAHL entered into the transaction for the prohibited purpose of putting assets beyond the reach of a person who may make a

claim against it, or of otherwise prejudicing the interests of such a person in relation to such a claim: s.423(3).

497. The directing minds of SAHL, whose intentions and knowledge are to be attributed to it, were Mr Marsh and Mr Rowland. As I have found, IPSA 2019 was made urgently in the face of the winding up of the Company, to try to preserve or protect the IP from a claim by the liquidator of the Company – in other words, to try to prevent the IP formerly owned by the Company from being retrieved by the liquidator for the benefit of the Company's creditors.

498. Mr Marsh protested that Serisys was simply trying to do right by Ms Ball, in whose favour SGL had attempted to grant security in 2016 (and, if it had done so effectually, would have been immune from challenge by the Company's liquidator) but had failed to do so as SGL had no title to the IP collateral. That may be true up to a point – but the motive for the IPSA 2019 was not to correct a mistake suddenly discovered, it was to try to ensure that the IP was safe from enforcement by the liquidator of the Company. Even if both purposes existed, one of them was to put the IP beyond the reach of the Company's liquidator. It was a real and substantial purpose and that suffices to establish the prohibited purpose required by s.423(3).

499. The IPSA 2019 was accordingly a transaction defrauding creditors within the meaning of s.423 of the 1986 Act.

<u>Was the 2026 charge a TUV and a TDC?</u>

500. IPSA 2026 was conceived to replace IPSA 2019 in case there was something about the latter which could not be relied upon to give Ms Ball priority.

501. The terms of IPSA 2026 and the 2026 loan agreement were the same as the 2019 documents, except that the repayment date of the loan was extended for a year. That was of theoretical benefit to SGL, the borrower, though Ms Ball had no intention in fact of calling in her loan, much less of enforcing her security against SAHL, as this would have damaged Serisys's business model.

502. Whether the IPSA 2026 transaction was at an undervalue depends on whether SAHL received any consideration, and, if so, whether it was of significantly less value than the consideration that SAHL provided. The effect of the transaction was that SAHL's IP collateral could not be enforced by Ms Ball for a year, but equally it was exposed to the risk that SGL was not required to repay the loan for another year. In substance, having agreed to discharge IPSA 2019, SAHL granted Ms Ball valuable security and itself received no consideration that was of value to it. SGL received the only consideration provided by Ms Ball, namely further time in which to repay her loan. Ms Ball did not agree with SAHL to forbear to enforce any rights that it had. The consideration received by SAHL was therefore of significantly less value to SAHL than the consideration that it provided by charging its valuable asset.

503. The purpose of releasing IPSA 2019 and entering into IPSA 2026 was admitted to be to try to put Ms Ball into a better position, by ensuring that her rights would have priority over the liquidator of the Company. That was, or included, a purpose of seeking to prejudice the liquidator's interests in relation to a claim that the liquidator might bring against SAHL, and so IPSA 2026 is also a TDC.

Is the 2026 charge an impediment to granting relief to GHSL in relation to the Assignment?

504. Section 241(2) , (2A), (3) and (3C) of the 1986 Act provide:

> "(2) An order under section 238 or 239 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the company in question entered into the transaction or (as the case may be) the person to whom the preference was given; but such an order—
>
> (a) shall not prejudice any interest in property which was acquired from a person other than the company and was acquired in good faith and for value, or prejudice any interest deriving from such an interest, and
>
> (b) shall not require a person who received a benefit from the transaction or preference in good faith and for value to pay a sum to the office-holder, except where that person was a party to the transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of the company.
>
> (2A) Where a person has acquired an interest in property from a person other than the company in question, or has received a benefit from the transaction or preference, and at the time of that acquisition or receipt—
>
> (a) he had notice of the relevant surrounding circumstances and of the relevant proceedings, or
>
> (b) he was connected with, or was an associate of, either the company in question or the person with whom that company entered into the transaction or to whom that company gave the preference,
>
> then, unless the contrary is shown, it shall be presumed for the purposes of paragraph (a) or (as the case may be) paragraph (b) of subsection (2) that the interest was acquired or the benefit was received otherwise than in good faith.
>
> (3) For the purposes of subsection (2A)(a), the relevant surrounding circumstances are (as the case may require)—
>
> (a) the fact that the company in question entered into the transaction at an undervalue; or
>
> (b) the circumstances which amounted to the giving of the preference by the company in question;
>
> and subsections (3A) to (3C) have effect to determine whether, for those purposes, a person has notice of the relevant proceedings.
>
> …….
>
> (3C) In a case where section 238 or 239 applies by reason of the company in question going into liquidation at any other time, a person has notice of the relevant proceedings if he has notice—
>
> (a) where the company goes into liquidation on the making of a winding-up order, of the fact that the petition on which the winding-up order is made has been presented or of the fact that the company has gone into liquidation;
>
> (b) in any other case, of the fact that the company has gone into liquidation."

505. Accordingly, as the legislation applies in this case, the court has discretion to make an order affecting Ms Ball's proprietary interests in SAHL's IP unless that interest was acquired by Ms Ball in good faith and for value. It is presumed that her interest was acquired otherwise than in good faith if she had notice of the relevant surrounding circumstances and the relevant proceedings or was connected with or was an associate of the Company or SAHL. Since Ms Ball was connected with SAHL, being the wife of a director of that company, it is unnecessary to consider the alternative basis under s.241(2A) on which it may be presumed that good faith was absent. The onus therefore lies on Ms Ball to prove that she took her interest under the IPSA 2026 in good faith and for value.

506. Ms Ball cannot of course prove that, because she knew in February 2026 that GHSL was proceeding to reclaim the Company's IP on the basis that the Assignment was a TUV and a TDC, and the IPSA 2026 was itself a TDC.

507. The IPSA 2026 is therefore no impediment to the grant of relief to GHSL in specie against SAHL's IP, if that course is considered appropriate. The Court has jurisdiction to make an order, if appropriate, to ensure that any proprietary interest of GHSL has priority over Ms Ball.

XIII. Preference or unlawful loan

508. This additional claim relates to money paid by the Company to Mr Marsh in September and October 2018, amounting to £105,790.

509. On these payments being questioned by the liquidator of the Company, it was first asserted by Mr Marsh that they were partial repayments of loans by him to the Company; then later, on 4 January 2021, Mr Marsh wrote:

> "… all the transactions through my bank account were... funds belonging to SGL or SSL which were transmitted onward to the company concerned... and involved no beneficial credits to my account. The question of preference does not arise... I was a mere conduit."

510. GHSL challenges that explanation, claiming that £85,790 of the total sum was not transferred onwards but kept by Mr Marsh, and the remaining £20,000 was sent to Ms Ball on the day it was received. Given the Company's insolvency and winding up, this is alleged to be a preference that can be reclaimed. Alternatively, if it was not money paid to Mr Marsh as a creditor of the Company, it is alleged to have been an unlawful loan to Mr Marsh, having not been declared to or approved by the board of the Company.

511. The THDs' Defence pleads that the funds in the Company's bank account were SGL's or SSL's money, and that pursuant to a loan agreement between Mr Marsh and SGL dated 9 October 2018 SGL owed Mr Marsh money, so the funds were paid to Mr Marsh to repay that loan.

512. The matter was explored in evidence with Mr Marsh, who said that £85,790 was SGL's money, used to repay SGL's debt to him, and that £20,000 was SSL's money, and was used to repay in part the debt that SSL owed Ms Ball. However, he then said that all the money that was paid by the Company to him was paid to the Company, for convenience, by investors in SGL, who were buying shares. Mr Rowland said that some investors would pay in pounds sterling into a UK bank account held by the Company for convenience, rather than make a SWIFT transfer to a Hong Kong bank.

513. Mr Marsh accepted that neither the loan agreement between him and SGL nor the repayment of that loan was disclosed to the SGL board, though the agreement itself was signed by Mr Rowland on behalf of SGL and witnessed by Mr Wong. It contains a running account of funds in sterling and Hong Kong dollars from January to October 2018, which shows that repayments by SGL were credited on dates and in amounts that correspond to the payments from the Company to Mr Marsh that GHSL pleads.

514. On 5 October 2018, four days before the loan agreement was signed, Mr Mitra, the Company's auditor, had warned Mr Rowland about wrongful trading, overdue accounts and their unpaid fees, and said that they might have to resign if the accounts were not filed and the fees paid.

515. Mr Marsh exhibited to his trial witness statement annotated bank accounts of the Company that record the payments out to Mr Marsh (including the £20,000 that he said he paid to Ms Ball). These also record payments made to the Company by Mr Marsh, identified as loans, and quite large amounts paid by Stephen Silman, Gillian Treasure and a few others, some of which are marked with the words "Treasure" or "Rights Issue", amounting to over £130,000 in aggregate. There was in fact a private placement of shares in SGL in August 2018, which raised US$167,000, and then rights issues in September and October 2018, which raised just under US$500,000.

516. Mr Smith contended in closing submissions (and no one disputed) that SGL had a shareholder called Treasure, and it was common ground that Mr Silman was a shareholder. The number of shares held by Mr or Ms Treasure increased by over 800 after May 2018.

517. On balance, I consider that this documentary evidence shows that substantial sums being paid into the Company's bank account were probably subscriptions for SGL shares, and that the money that was paid by the Company to Mr Marsh in September and October 2018 could well have been, and probably was, SGL's money beneficially, paid into the Company's account for convenience. The fact that it was not a trust account does not alter the conclusion that, as between the Company and SGL, the money belonged to SGL. I find that, in the general confusion of monies flowing around the Serisys group and because the funds came out of the Company's sterling bank account, it is understandable that Mr Marsh initially thought that it was the Company's money. However, as contemporaneous documents show, it was probably SGL's money.

518. That being so, the claim of preference fails, because the Company was not paying Mr Marsh a debt that it owed him. It was paying him money that belonged to SGL, which Mr Marsh then treated and documented as repayment of part of his loans to SGL.

519. Whether it was morally right for Mr Marsh to prefer his and his wife's interests in that way with SGL's money, at a time when Serisys had substantial commercial debts, is not

a question for this court.

520. From my conclusions, it follows that GHSL's alternative claim that there were unlawful loans also fails.

XIV. Remedies

521. I have found that claims against Mr Marsh and Mr Rowland for breach of duty in relation to the Assignment and the provision of free services to SAHL have succeeded, and that the Assignment was a TUV and a TDC. I have found SAHL liable for dishonest assistance of the directors' breaches of duty and for conspiring with Mr Marsh and Mr Rowland to injure the Company and its creditors by unlawful means. I also decided, as against Ms Ball, that the IPSA 2026 is a TUV and TDC and is no impediment to the Court making an order that affects her interest in SAHL's IP.

522. For the TUV and TDC, the relief sought by GHSL is a vesting order, by which the Company's IP that was transferred to SAHL by the Assignment is re-vested in it, compensation for the diminution in value of that IP, and, if necessary, an order setting aside the IPSA 2026. The diminution in value sought is the difference between the value of the Company's IP at the time of the Assignment and today (which on the basis of my findings is £1,484,000).

523. For the breaches of duty, GHSL seeks equitable compensation or damages, in unspecified amounts. This compensation will be for the losses that the Company suffered on account of the breaches that led to the Assignment and provision by the Company of free services to SAHL, with SAHL being liable as accessory for the breaches of duty relating to the Assignment. For the conspiracy between Mr Marsh, Mr Rowland and SAHL relating to the Assignment, GHSL seeks damages for loss caused.

524. Clearly, there is a substantial risk of double recovery in determining the appropriate relief for the causes of action that have succeeded. In some cases, the relief to be granted is discretionary, in others not so.

525. The amount claimed for the breaches of duty has not been identified in submissions. I am unclear what GHSL seeks in relation to the breaches relating to the free services. The quantum for the breach relating to the Assignment will presumably depend on whether the IP is re-vested in the Company. The absence of submissions on causation and quantum for breach of duty is perhaps telling: the focus of GHSL was on recovery of AdyptUK and compensation for its diminution in value, and on the increased deficit to creditors resulting from the alleged wrongful trading.

526. I shall therefore focus on the appropriate relief in principle for the TUV and TDC as against the THDs (GHSL seeks the same relief for both claims) and the equitable compensation or damages for the Assignment. Following the hand down of this judgment, the parties can attempt to agree the quantum for any other causes of action, where this does not simply duplicate the awards that I will make. If it cannot be agreed, the parties can apply for directions in that regard.

527. Section 238(3) of the 1986 Act states that, subject to the provisions that follow it, the court shall make "such order as it thinks fit for restoring the position to what it would have been if the company had not entered into the transaction in question". Mr Riley accordingly submits that there is a strong presumption in favour of restitution when granting relief for a TUV. I agree that that is the apparent starting point. However, section 241 gives non-exclusive examples of orders that the court may make, when granting relief for a TUV, which include: requiring any property transferred to be vested in the company; releasing or discharging any security given by the company; providing for security to be given over any property for the discharge of any obligation imposed; and requiring any person to pay, in respect of benefits received from the company, such sums as the court may direct. That implies that the effect of the transaction can be unwound in more ways than simply setting it aside.

528. The principal difficulty with the order that GHSL seeks, namely to vest the Company's IP in GHSL, is that the order would be in respect of property that was not identified in the trial or in this judgment. GHSL failed to prove its case as to the specific part or parts of Adypt that it contended was "AdyptUK" (i.e. subject to the Company's copyright), and I was unable, on the evidence before me, to decide exactly what the Company's IP comprised.

529. If I were to make an order vesting the Company's IP in GHSL, I could only do so by referring to the "Intellectual Property", as defined in the Assignment. The parties, in those circumstances, would be left with uncertainty about the effect of the order and at risk of a copyright action to identify exactly what SAHL holds. Perhaps it is considered sufficient for the purposes of GHSL's owners to have that negotiating position, I do not know. But it is a significant point against a vesting order that it may well lead directly to another round of litigation.

530. Although, as I have found, the Company's former IP could be used to develop a standalone version of Adypt for development licensing, a more sensible outcome would plainly be for Adypt to be united in someone's hands, thereby significantly increasing the value of the whole. Leaving the Company's part and SSL's part in separate ownership would leave SAHL without a platform or "engine", which may negate any substantial value in what it retains. On the other hand, to leave any benefit of the wrongdoing with SAHL is not intuitively the right result.

531. A further question about granting a vesting order is how the additional monetary payment that GHSL seeks is to be assessed. GHSL seeks monetary compensation for diminution in value of the asset since August 2017. The THDs unrealistically deny that there should be any such compensation. It is in my judgment logical and right that the creditors of the Company are (notionally) put in the same position that they would have been but for the TUV. However, as the creditors would not have benefited from the asset before the liquidation, the right sum is arguably the difference between the March 2019 value and the current value, not between the August 2017 value and the current value.

532. It is evident that the owners of GHSL have conducted this litigation with a view to recovering the IP, and must believe that it is of greater value, in their hands, than the value that a professional valuer can properly place on it in its current state. SGL, too, clearly believes that there remains a valuable future for Adypt as a whole. I heard Dr Rhodes disclaim any personal interest in the outcome of this litigation but heard nothing from Mr Barty Smith and Mr Shovell, who despite running this litigation themselves

until GHSL appointed solicitors in November 2025 have chosen not to give evidence to explain their position.

533. The appropriate relief has to be considered in the context of the statutory regime, which is concerned with the protection of creditors and a *pari passu* distribution of a company's assets among its unsecured creditors (see TAQA Bratani Ltd v Fujairah Oil and Gas LLC [2025] EWCA Civ 1669 at [31]-[33]). This purpose would be satisfied, in principle, by monetary compensation, if such an order were enforceable. Although, in an era of commercial funding agreements it is common for TUV claims to be brought by assignees of the liquidator's rights, the claim and the appropriate remedy should nevertheless be seen in the context of the statutory claim. A special interest of an assignee, while not wholly irrelevant, should not be allowed to dictate the remedy.

534. There are therefore good reasons to consider whether, given the nature of the asset in this case, relief other than a vesting order may be more appropriate, and more just, as a means of providing the value that should have been available to the creditors of the Company.

535. If GHSL, standing in the shoes of the liquidator, is able to be compensated fully for the financial value wrongly transferred by the TUV and TDC, there will in my judgment be no further reason to make a vesting order that is capable of giving rise to difficulty between the parties, or capable of doing disproportionate harm to SGL's proper interests, or both. Since a vesting order will leave undefined what is vested in GHSL, creating a risk of further disputes, and since it may result in further loss in the value of SSL/SAHL's own interest in Adypt, I consider that it is more just and convenient, and better fits the statutory purpose in this case, for GHSL to be given the full value of what was wrongly transferred to SAHL rather than the asset itself. I do not consider that GHSL's preference to recover the asset itself should be taken to outweigh the potential problems with a vesting order that I have described. GHSL as assignee can be in no better position than the liquidator. However, GHSL should not be required to take the risk of non-payment.

536. I will therefore order Mr Marsh, Mr Rowland and SAHL to pay the full value of AdyptUK on 30 August 2017, on the basis that, by their breaches of duty and accessory liability, an asset of that value was wrongly taken away from the Company. Payment of that sum prevents SAHL from benefiting in any way from its wrongdoing but does not further penalise it. Equitable compensation for the loss caused will be payable by the THDs other than Ms Ball in the same amount. The amount of liability for conspiracy to harm the Company will be the same. These remedies are non-cumulative. An order for payment of £2,034,000 will therefore be made against Mr Marsh and Mr Rowland and against SAHL.

537. To ensure that the remedy under s.238 and s.423 is effective, security will be granted over Adypt pursuant to s.241(1)(f) and (2) of the 1986 Act for the performance of the obligation to pay that sum of money. Ms Ball's interest under the IPSA 2026 will be postponed to GHSL's interest. If that postponement is effective to protect GHSL's rights, there is no reason to set aside the IPSA 2026, which could have the effect of prejudicing Ms Ball's rights against other creditors. I will, however, invite the parties to consider the appropriate terms of a deed of charge and postponement and to make further submissions in writing on the terms of the charge, priority and postponement, and setting aside IPSA 2026, as appropriate.

538. The correct assessment of the amount of equitable compensation or damages for the remaining causes of action will also be addressed in further written submissions.